BENEFITS AND DRAWBACKS OF THE SUPERFUND STATUTE'S LIABILITY PROVISIONS

Y 4.G 74/7:SU 7/25

Benefits and Drawbacks of the Super...

HEARING

BEFORE THE

ENVIRONMENT, ENERGY, AND NATURAL RESOURCES SUBCOMMITTEE

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

NOVEMBER 8, 1993

Printed for the use of the Committee on Government Operations

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BENEFITS AND DRAWBACKS OF THE SUPERFUND STATUTE'S LIABILITY PROVISIONS

MONDAY, NOVEMBER 8, 1993

HOUSE OF REPRESENTATIVES,
ENVIRONMENT, ENERGY,
AND NATURAL RESOURCES SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 1 p.m., in room 2247, Rayburn House Office Building, Hon. Mike Synar (chairman of the subcommittee) presiding.

Present: Representatives Mike Synar, Karen L. Thurman, John L. Mica, and Bernard Sanders.

Staff present: Sandra Z. Harris, staff director; Sheila C. Canavan, professional staff member; Ruth Fleischer, counsel; Elisabeth R. Campbell, clerk; and Charli E. Coon, minority professional staff, Committee on Government Operations.

OPENING STATEMENT OF CHAIRMAN SYNAR

Mr. SYNAR. The subcommittee will come to order.

In 1980, in the wake of Love Canal and other hazardous wastesite horror stories, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, commonly known as Superfund, to protect the public from releases of hazardous substances into the environment.

The Superfund law authorizes EPA to compel potentially responsible parties [PRPs], to clean up contaminated sites or to reimburse EPA for its cleanup costs. The law also created a trust fund financed primarily by fees on industry to pay for site assessments and for cleanup at sites where PRPs could not be identified or were unable or unwilling to pay.

The goal of the program was praiseworthy, but its implementation, very candidly, has been nothing less than a bureaucratic nightmare. There currently are 1,195 sites on the Agency's national priorities list of sites to be cleaned up. Astronomical costs and significant cleanup delays have plagued the program since its inception.

Thirteen years into the program, over $6 billion in trust fund moneys has been spent. The cost to the private sector for conducting actual Superfund cleanup and paying for legal fees and associated Superfund costs has been much more. And while the program has been effective in removing hazardous wastes which pose imme-

diate threats to human health and the environment, EPA estimates that the construction of long-term cleanups is complete at only 219 sites and even that low number, very candidly, is again subject to dispute.

This is the first of several hearings the subcommittee intends to hold examining various aspects of the Superfund program. Today, the subcommittee will be reviewing the benefits and drawbacks of the current Superfund law's retroactive, strict, joint and several liability provisions.

As we will hear from our first panel, Superfund's liability provisions often lead to unfair results for companies who have always tried to comply with the law. Because the law's liability provisions are retroactive and strict, PRPs are held responsible for cleaning up past contamination even if they were in full compliance with the laws at the time of disposal. Because the law's liability provisions are also joint and several, any one PRP could be held liable for the entire cost of the cleanup, even if the PRP is only responsible for a small portion of the hazardous waste at the site.

A host of unforeseen parties has been dragged into Superfund's web of red tape, litigation, and branded polluters. And even de minimis waste contributors like the local little league or Elks club have been dragged in. Some argue that these contributors should be "carved out" of the process, leaving only the big PRPs to pay for cleanups.

In my view, this approach ignores the fact that many of these parties, indeed all of our society, had some hand in creating the mess and should contribute at least something to the cleanup of these older sites.

The theory behind Superfund's liability scheme is that the "polluter" should pay to clean up contamination he caused. But what we hoped would be "polluter pays" in theory has actually turned into "deep pockets" paying in reality. And those who are paying are also paying the cost of the so-called "orphan share" of sites where PRPs are either insolvent or unidentifiable. That is not "polluter pays" and, very sincerely, that is not fair.

Congress recognized some of these problems when it reauthorized the law in 1986 with the passage of the Superfund Amendments and Reauthorization Act which we know as SARA. SARA authorized EPA to use a host of settlement tools to reduce additional transaction costs by getting earlier settlements with PRPs. But, as GAO will testify today, EPA has not made sufficient use of these tools.

Although EPA has for 7 years had the ability to reach earlier settlements with PRPs, the Agency has only recently, under pressure from Congress and others, placed a greater emphasis on reaching quick and inexpensive settlements. Given this track record, I am not sure the Agency will be able to make the administrative improvements necessary to resolve these issues on its own.

I believe that fundamental changes to the current Superfund liability system are necessary if we are to have, in my opinion, a meaningful system and meaningful progress. But the question is: How?

The range of views as to how to fix the Superfund liability scheme varies from tinkering at the edges of the current system to

abolishing retroactive liability altogether in favor of an EPA-administered cleanup program financed primarily by industry.

Today we will hear from proponents of both extremes, as well as from proponents of a recently circulated hybrid system. All have very good aspects to them and all have some serious drawbacks, but as I said around this time last year, Congress should not make the easy choice of the devil we know over the devil we don't know simply because we are afraid of an unknown outcome. The outcome we are experiencing under this current system is too bleak and too costly to continue.

One final note. Because the administration is currently in the midst of its interagency process of considering various Superfund reform proposals, the subcommittee will defer at least for today hearing from EPA on the need for liability reform until the interagency process is complete. We will hear from them once that process is finished however.

At this time, I would like to call on Mr. Mica for an opening statement.

Mr. MICA. Mr. Chairman, first, I want to take this opportunity to thank you and compliment you on first calling these hearings and conducting them today, the beginning of what I understand will be a series of hearings.

As a new Member of Congress, you are almost immediately confronted or I was confronted when I started looking at Superfund, and my reaction, as a person who came from business, was of horror and disbelief of what was taking place, and I do appreciate your response.

I have written the chairman on this and he has followed through and is conducting these hearings. Again, this being the beginning of a very important question, the question ultimately is: How do we make Superfund more efficient, how do we make it responsive, and how do we make it fulfill its objective to clean up those sites that, in fact, demand our attention?

So far, the only ones who appear to be cleaning up are attorneys. They seem to be cleaning up. Somebody joked, if we were going to clean up Superfund sites, that if we could do it with legal briefs, we would have a lot of the ammunition and tools to begin the process with.

Even in spite of congressional action, in 1986, it gave Superfund additional tools to begin that important task. I have had a chance to read some of the testimony that we will see here today from GAO that talks about the limited use made of techniques to reduce legal expenses and so far that program appears to be a failure, and this document is further a failure of the Agency to proceed.

So we have not fulfilled our promise to the American people. We have not fulfilled our promise to make EPA responsive. We have not fulfilled our promise to allow EPA and Superfund to do the job that it was chartered with.

What is also disturbing to me—and one thing that I found in my small bit of research on this—is that Superfund was intended to be a self-funding mechanism and should be paying its own way and some reports that we have indicate that up to—well, in excess of $4 billion in funds—are not being recovered because of the failure of Superfund not to work.

So with that in mind, and again with an excellent agenda set up by the chairman and the staff for this hearing, I welcome this hearing and again compliment the chairman for kicking off this series on Superfund.

Mr. SYNAR. Thank you, Mr. Mica. I will ask unanimous consent to enter any other Members' statement in the record.

[The information can be found in the appendix.]

Mr. SYNAR. And at this time, I would call on Mr. Sanders.

Mr. SANDERS. Thank you, Mr. Chairman.

Mr. Chairman, I want to thank you for holding this hearing today on the problems with the present liability system of the Superfund program. This hearing will help us get at the heart of the difficulties that Superfund liability has created for businesses, the cities and towns, and individual citizens all over this country.

It will also lay the groundwork for future hearings at which we will be asking the EPA, the Treasury Department, and other government agencies to explain their administration of this program and to tell us what they propose to change about it so that it efficiently fulfills its original purpose: To clean up the hundreds of dangerous toxic wastesites which potentially threaten public health in every part of our country.

The fundamental problem with Superfund that we will be considering today can be stated very simply. We are spending too much energy, time, and money on fighting over who will pay the bills and not enough on actually cleaning up. The so-called "transaction costs" which are lawyers' fees, consultant studies, negotiation procedures, and all the other paperwork involved in the Superfund process have escalated completely out of control. Money that should be going to actually cleaning up toxic wastesites is instead being spent on trying to get someone else to foot the bill.

Now, this may be an effective way for large corporations to spend their money, although I doubt it is even for them, but it certainly isn't effective to small businesses, city governments, and individual citizens to be caught up in this quagmire, nor is it an efficient way for the Federal Government to be spending the taxpayers' moneys.

I am delighted that our first witnesses today are from the State of Vermont, constituents and friends of mine who are here to testify about the horrible problems they have had with the Superfund over the issue of the Pine Street Barge Canal in Burlington, VT.

Today we will be hearing from Dr. Robert Perrin, a dentist; and Charles Shea, a lawyer concerning their dealings with the EPA on this question. The story they have to tell us is not a happy one but it is an important one. And I want to thank them for coming here today to tell it, and Chairman Synar and his staff for arranging for them to be here with us today.

The Pine Street Barge Canal was one of the first sites put on the priority list when Superfund was set up in 1981 and, since then, it has been an ongoing problem for the city under several administrations. As it happens, I was mayor of Burlington from 1981 to 1989 and know the many, many hours, the extraordinary number of meetings that we held dealing with the barge canal during my tenure as mayor.

It is now almost 5 years later, but the barge canal problem is still very much with the people of Burlington and apparently no

closer to a solution than it was when we began this whole process. Having dealt with the EPA on several issues, I know very well my constituents' frustration with their bureaucratic working, their slowness, and their choice of expensive alternatives over really protecting the environment and public health in a quick and efficient way.

The Pine Street Barge Canal is a prime example of this. As I understand, we have spent over $6 million on studies already and I think in fact the general consensus is, those studies aren't worth a whole lot and they are going to have to start again.

Mr. Chairman, the Superfund issue is complicated. The present system for dealing with toxic sites is a bureaucratic maze of individual complexity and there are several different proposals for reforming. We will be hearing about some of those today. And I don't presume to prejudge, but I am going to be looking at every one of them with an important question in mind: Will this alternative prevent what has happened to Dr. Perrin and Mr. Shea and hundreds of other people throughout this country from happening to other people again?

Environmental protection is one of the most important responsibilities of government, in particular when it involves toxic chemicals which can be dangerous threats to public health. This makes it all the more important that programs such as Superfund run efficiently and they really solve the problems rather than creating new ones. Today, that is not what is happening and it is our responsibility to find out why and to fix it.

So I thank you very much, Mr. Chairman, and your staff for bringing together this important hearing and look forward to what we will be hearing.

Mr. SYNAR. Thank you, Mr. Sanders.

Mrs. Thurman.

Mrs. THURMAN. Mr. Chairman, I would just like to take this opportunity to also commend you on holding this hearing and to the panelists.

When I was in the State Senate in Florida, I worked on a piece of legislation dealing with leaking underground storage tanks, and I want to let you know we set aside some of the liability issues because we thought that the benefit to the public was much more important than fighting over who was liable.

So I am looking forward to your testimony and your experiences, and I would hope as we go through this process, that the legislation that comes out of Congress keeps that in mind, that it is important for the health and safety of our public to get these things cleaned up and get on the way.

Mr. SYNAR. Thank you very much.

Our first panel this afternoon is David Gibbs, director of corporate environmental affairs, Webco Industries, Sand Springs, OK; Mr. Charles Shea and Dr. Robert Perrin, formerly of Leverage Partners of Burlington, VT.

Gentlemen, it is the policy of this subcommittee in order not to prejudice past or future witnesses to swear in all of our witnesses.

Do any of you have any objections to being sworn? If not, stand and raise your right hand.

[Witnesses sworn.]

Mr. SYNAR. Welcome, gentlemen. We appreciate you being here today. We will also include in the record your entire testimony. And at this time, we would ask you to summarize.

Mr. Gibbs, why don't we start with you this afternoon.

STATEMENT OF DAVID E. GIBBS, P.E., CHMM, DIRECTOR, CORPORATE ENVIRONMENTAL AFFAIRS, WEBCO INDUSTRIES, INC., SAND SPRINGS, OK

Mr. GIBBS. Thank you, Mr. Chairman. Good afternoon, members of the subcommittee. Webco is a family owned and operated company that produces specialty steel tubing. We are pleased to be here today and present our views as a PRP on how the EPA's Superfund program has impacted us and some of our ideas on how the process could be streamlined.

First, a little background. Webco's manufacturing process requires use of chemicals common to the steel industry. Over a period of time, these chemicals become contaminated and require disposal. Like many responsible manufacturing industries, Webco attempted to identify available disposal options that would be protective of the environment. Disposal methods were selected in accordance with all the appropriate guidelines and legal requirements.

These diligent efforts, however, were to no avail. The current Superfund liability system places Webco in a predicament where a constant threat to our financial resources and competitive position looms over us with no end in sight.

Webco's first Superfund experience was with the Hardage Criner NPL site. The Hardage facility was the first industrial wastesite and the only industrial wastesite licensed by the State of Oklahoma during the period 1972 to 1980. Webco's second Superfund experience was with the Sand Springs Petrochemical Complex NPL site. Waste from Webco's operation was delivered to an establishment purported to be engaged in the reclamation of waste oils.

Since being identified as a PRP, Webco has actively participated and cooperated with the other PRPs at these sites. At each of these Superfund sites, the waste supposed to have been derived from Webco's operation are not the type of material that is driving the remedy costs. However, this fact has little bearing within the current Superfund liability system.

The amount of money wasted by the Superfund program in the name of environmental protection is ridiculous. At the Hardage site, over $40 million has been spent with practically no benefit to the environment. It took over $40 million to get a remedy approved that would work. It took $40 million to defeat an Environmental Protection Agency remedy that would have endangered the very environment they were created to protect. Hardage is a classic example of how ineffective the EPA's Superfund program is capable of being.

The following are some of Webco's ideas as to how the Superfund program may be more streamlined. First, provide some mechanism to allow for relative toxicity. Companies such as Webco whose waste is relatively innocuous and is not driving the remedial costs should not have to bear a burden equal to a company whose waste is more toxic and actually forms the basis of the remedy design.

Second, use mixed funding more readily. Allocation of so-called orphan shares is inequitable. Rather than spread the orphan shares among the viable PRPs, the EPA should be more willing to use money accumulated in the Superfund.

Our third suggestion is that a higher burden of proof should be required to establish PRP liability. Joint and several liability should be eliminated. The concept of proportional contribution should be used instead.

Finally, Webco would like to see an increase of PRP participation in the selection of cleanup remedies. The Hardage site is a perfect example of why the EPA should not be given carte blanche on remedy selection. EPA's reckless investigative techniques at Hardage could have actually increased environmental damage. The net effect of the EPA's efforts at Hardage is that millions of dollars have been spent with only a very minuscule portion actually going toward site cleanup.

In summary, Webco, like most reasonable and responsible citizens, aggressively supports environmental protection. The days of seemingly unlimited resources are long past. Superfund reform is drastically overdue and earnestly needed. Webco urges this subcommittee to go forward with their efforts to reform this well-intentioned but dangerously off-course program.

Thank you.

Mr. SYNAR. Thank you very much, Mr. Gibbs. I appreciate your testimony. It is very insightful.

[The prepared statement of Mr. Gibbs follows:]

WEBCO INDUSTRIES, INC. AND SUPERFUND

Testimony of

David E. Gibbs, P.E., CHMM
Director, Corporate Environmental Affairs

on behalf of

Webco Industries, Inc.

to the

Congress of the United States
Environment, Energy and Natural Resources
Subcommittee

of the

Committee on Government Operations
Washington, D.C.

November 8, 1993

Introduction

Webco Industries Inc. (Webco), is engaged in the manufacture of specialty steel tubing. The tubing is used in a wide variety of applications ranging from nuclear submarines to lawn mowers, oil field equipment, automobiles and the power utility industry.

Webco is a family owned business established by Mr. F. William Weber. Mr. Weber built the first manufacturing plant, initially known as Southwest Tube Manufacturing Company, on an empty pasture in Sand Springs, Oklahoma. Tube production commenced in 1970. Since then, the Sand Springs facility has expanded to include 26 acres of property with over five acres under roof and almost 400 employees. Webco's corporate headquarters is located at the Sand Springs facility.

As Southwest Tube Manufacturing Company's reputation for quality tubing and superior service grew, additional manufacturing facilities were commissioned over the years to meet the increased market demand. It became evident that consolidation of manufacturing support services would be a more effective use of resources. On August 1, 1989, Mr. Weber decided to combine his tube manufacturing businesses under the corporate name Webco Industries, Inc. with the various facilities being divisions of Webco.

Webco now produces tubular products at three manufacturing facilities. These facilities are the Southwest Tube Division located in Sand Springs, Oklahoma; the Stainless Division located in Mannford, Oklahoma; and the Oil City Tube Division located in Oil City, Pennsylvania.

The Webco Corporation has established a distinct leadership role in the industry and has earned a significant share of the specialty tube market. Today, Webco's total production capability exceeds 7,000 tons per month.

How Webco Became Involved with the Superfund Program

In order to manufacture the tubing, Webco uses certain chemicals common to the steel industry. Acids, caustics and machine coolants are essential components used in the production process. As with many other manufacturers, Webco followed standard industry practice in identification of permitted and licensed waste transportation and waste disposal facilities. Arrangements were then made to properly manage Webco's industrial wastes. Despite having carefully followed all contemporaneous rules and regulations, Webco has been identified as a Potentially Responsible Party (PRP) at two Superfund sites.

Hardage Site

Webco's first experience with EPA's Superfund Program began with waste acids and caustics allegedly delivered to a location known as the Royal N. Hardage (now the Hardage Criner National Priority List (NPL) Site) disposal facility in 1974. The Hardage Criner facility, located in rural McLain County near Criner, Oklahoma, was the first hazardous waste disposal site to be permitted in the State. The facility began accepting wastes in 1972 and was closed in 1980. In addition to being the first facility permitted to accept industrial wastes for disposal, Hardage was also the only licensed hazardous waste disposal site in the State.

Sand Springs (Glen Wynn) Site

Webco's Sand Springs plant also generates spent oil-based coolant. Some of the spent coolant was allegedly delivered to an establishment purported to be engaged in reclamation of waste oil. During the time frame of 1975 until the early 1980s, a waste oil reclamation facility operated by Mr. Glen Wynn was located approximately two miles from Webco's Sand Springs plant. The reclamation facility, known as the Glen Wynn Site, is now part of a larger NPL site known as the Sand Springs Petrochemical Complex NPL Site.

Why Webco Should Not be Involved with the Superfund Program

Although Superfund's immense goal of protecting human health and the environment from threats posed by abandoned toxic waste dump sites is exceedingly important, the draconian penalties Webco and other small manufacturing businesses must bear is unreasonable and inequitable. In spite of the remedy costs primarily being driven at both sites by substances not found in Webco's waste, Webco is forced to bear a disproportionate share of those costs.

The raw materials and chemicals used by Webco have not changed substantively from initiation of the manufacturing process. Even though contemporaneous data are unavailable, laboratory data obtained on waste generated at Webco today may be convincingly extrapolated as representative of wastes Webco allegedly disposed of at the Hardage and the Glen Wynn Sites. However, these facts have little bearing within the current Superfund liability system.

Webco's Experience with the Hardage Steering Committee

Since Webco had operated entirely within all legal guidelines, threats of legal action were astonishing. However, Webco elected to join the Hardage Steering Committee, commonly referred to as the HSC. As compared to allowing EPA a freehand in selecting the site remedy, joining the HSC was ultimately to Webco's benefit. Hardage is a classic example of how ineffective the EPA Superfund is capable of being.

At Hardage, the EPA wanted to excavate all the source materials and dispose of them in an onsite landfill. The EPA's remedy was initially estimated to cost $318 million. The HSC advocated a different remedy that was estimated to cost $54 million. The HSC's remedy primarily consisted of an interceptor trench and onsite treatment plant. The interceptor trench would capture contaminated ground water which would then be treated onsite.

On the other hand, the EPA's proposed remedy was fraught with problems. Experience at other site clean ups has shown that excavation of such materials would pose substantial toxic chemical exposure threats to remedial workers, the public and the environment. The EPA persisted, however, in advocating their remedy in spite of the overwhelming scientific evidence that their proposed methods could exacerbate the existing situation.

Although the EPA's ineffective defense of their remedy was helpful to the HSC's case, the HSC's remedy was clearly the better choice as evidenced by the scientific data presented during the remedy trial. The Court agreed. The HSC's remedy would be implemented. Today, nearly four years after the EPA had first suspected problems at the Hardage Site and almost $40 million dollars later, the cleanup has only begun. Webco's net share has been $360,000 so far. Over $200,000, and probably much more, remains to be paid by Webco over the next couple of years.

Webco's Experience with the Sand Springs Steering Committee

Cleanup of the Sand Springs Site (Glen Wynn) had also been confounded by problems as a result of how the EPA handles PRP negotiations. Even though the Glen Wynn Site remedy is essentially complete, companies paying the bill had effectively no input on the type of remedy implemented and practically no control of any remedial costs. Obstacles to final settlement of liability persist because the EPA will only negotiate with one party, the Atlantic Richfield Company (ARCO). ARCO, which has responsibility for the entire 200 plus acre site, including the Glen Wynn portion, made an agreement with the EPA.

Even though the other PRPs were willing to negotiate with the EPA, the EPA decided to deal exclusively with ARCO since ARCO "volunteered" to clean up the entire site. This "sweetheart" deal left Webco and several other PRPs to fend for themselves against ARCO as third party defendants. The EPA and ARCO kept all other parties "in the dark" regarding the nature of ongoing negotiations.

When Webco first began to participate in the Sand Springs Steering Committee, a $9 million settlement with ARCO on the Glen Wynn remediation cost was imminent. Despite concerted good faith efforts by the Sand Springs Steering Committee, this settlement and several subsequent potential settlements foundered. Webco feels that although the Sand Springs Steering Committee's legal counsel put forth the best effort possible, a lot of time and money have been wasted by Webco and the other PRPs as a result of how the negotiations were handled by the EPA.

How These Experiences Have Affected Webco Today

Webco's experience with the EPA's Superfund Program has been bitter at best and potentially devastating at worst. Despite the fact of having done nothing wrong or illegal, Webco will likely pay nearly one million dollars due to involvement with the two NPL sites. Environmental legal and associated transactional expenses continue to skyrocket.

Webco avidly supports a clean environment. The trouble is that a vast majority of the money being spent under the guise of environmental protection does not go toward cleaning up or improving the environment. The Superfund Program is structured so that companies that tried to be environmentally responsible are now being penalized. Unscrupulous operators that participated in "midnight dumping" are largely unaffected.

Unfortunately, a large portion of money spent today by Webco on environmental issues goes to defending against lawsuits and threats of lawsuits brought on by the EPA's strict liability clause. The environment would benefit much more if Webco were able to allocate these resources toward protection of tomorrow's environment rather than having to defend itself against unjustified and unnecessary litigation. Not only did many of these alleged activities occur twenty years ago, they were legal at that time.

Furthermore, the EPA's current regulations allowing punishment of companies that exercised the best environmental management practices available at the time restricts commerce and may even

further damage the environment. A good example of how commerce is restricted is evidenced by Webco's recent attempt to exercise its purchase option on a lease agreement. An environmental site assessment showed that the property was clean except for one detail. The property is located near a Superfund site. Because lenders are so hesitant to take action due to Superfund, the property transfer is not complete almost one year later.

Superfund Reforms Webco Would Like to See Incorporated

There are many ideas circulating on how the Superfund Program could be improved. Rather than evaluate the merits of other's views, however, Webco is most qualified to present to the subcommittee its own views on how the program could be reformed to better serve the environment and businesses such as Webco.

Allowance for Relative Toxicity

The EPA's allocation scheme is seriously flawed. Some allocation mechanism should be made available that would take relative toxicity into account. Companies such as Webco, whose waste is relatively innocuous and is not driving remedial costs, should not have to bear a burden equal to a company whose waste is more toxic and actually forms the remedial component design premise.

Use Mixed Funding

Allocation of so-called "orphan" shares is inequitable. The Superfund was ostensibly created to fund remediation of abandoned waste sites. At many of these abandoned sites, the original generator is difficult, if not impossible, to identify. In these instances, rather than spread the orphan shares among the viable PRPs, the EPA should invoke mixed funding.

Establish a Higher Burden of Proof

In many cases, a business may be forced into the Superfund Program by the EPA or other PRPs based simply on speculation and circumstantial evidence. Decades old hand handwritten logs with questionable and sometimes cryptic entries are used to ensnarl an innocent business owner.

Equitable allocation of Superfund liability should be based on proportionate contribution. The unfair concept of joint and several liability should be abandoned and a PRP's contribution based on the type and amount of the PRP's waste proven to have been

found at the site. Superfund monies should be used to pay a share of the remedy when a clear link cannot be established between the suspected "polluter" and the environmental damage. In instances where the link between a waste generator and the associated damage can be established, then Webco agrees that the responsible party should be made to provide contribution.

Increase PRP Participation in Remedy Selection

The Hardage Site is a perfect example of why the EPA should not be given carte blanche on remedy selection. EPA's reckless investigative techniques actually could have increased environmental damage at Hardage. Fortunately, the HSC was successful in attaining a Court Order to stop the EPA from continuing their damaging activities at the Site.

In spite of the EPA's data being incomplete and scientifically flawed, members of the HSC will likely be forced to pay approximately $14 million of EPA's costs incurred developing their rejected remedy. This is in addition to the nearly $40 million the HSC spent in going to trial with the EPA over remedy selection. The net effect is that millions of dollars have been spent with only a very minuscule portion actually going toward site cleanup.

Summary

Webco, like most reasonable and responsible citizens, aggressively supports environmental protection. The days of seemingly unlimited resources are long past. This fact was recognized when Congress created the EPA to help protect and preserve the environment and natural resources. However, serious damage to businesses such as Webco, and sometimes even additional environmental damage is being created because of the EPA policies in effect today.

Difficulties Superfund presents in transfer of "used" property may cause some firms to construct manufacturing plants on virgin land, ruining scenic views while letting the potentially contaminated properties lie dormant. Surely this was not the Congressional intent when the Superfund legislation was enacted.

Superfund reform is drastically overdue and earnestly needed. Webco urges the subcommittee to go forward with their efforts to reform this well-intentioned but dangerously off-course EPA program.

Mr. SYNAR. Mr. Shea, I understand you are testifying for Dr. Perrin and yourself.

STATEMENT OF CHARLES T. SHEA, ESQ., FORMERLY OF LEVERAGE PARTNERS, BURLINGTON, VT, ACCOMPANIED BY ROBERT M. PERRIN, D.M.D.

Mr. SHEA. Yes, I am, Mr. Chairman. Thank you very much.

My name is Charles Shea. I am an attorney in Burlington, VT, and I have with me Dr. Robert Perrin who is a dentist who practices in South Burlington which is right outside of Burlington.

Our story, Mr. Chairman, members of the committee, started in 1970 or late 1960's when seven dentists, of which Dr. Perrin was one, as well as myself as an attorney and CPA, and one other joined together in an incorporation to form the leverage group. What in retrospect the doctors failed to do was include an environmental engineer as a part of the investment group because, what ended in what we thought was going to be a simple investment in real estate has drawn us into a litigation involving the Pine Street Barge Canal Superfund.

So that you may get a sense of the location of our site, our site is about 1,000 feet from where the site itself is located or was originally located. What happened with the Pine Street location is that from 1885 until 1965, the facility—there was a coal gasification plant and it disposed in some format the residue from the process and it has been estimated that there is perhaps 600,000 cubic yards of this material that was placed in that site which, again, is 1,000 feet or more, from our site.

In any event, we purchased what was called the Maltex facility, and for those of you who are familiar with Maypo, that is where they made Maypo years ago and it was the cereal business that had ceased. We purchased it. It was empty. We leased it for a furniture maker. None of us had any involvement with the property other than to make sure that the ordinary repairs would occur.

About 1965, we received a letter from the EPA which stated that there was—I might add that our property was on the east bank of Lake Champlain, that is, to our west was Lake Champlain, and in between the lake, a railroad, was what is called the barge canal and which was established back 150 years ago when Burlington was one of the main ports in the East.

We were told by EPA that there was some material on top of the water which appeared to be leaking out into Lake Champlain and they asked us to attend to taking care of it. We did that. We did at that time employ an environmental engineer. We had him tell us what to do. We did it. We paid for it. We got everybody's permission to do it and authority. And around 1979, we sold the facility. It was actually sold to the furniture maker through their financing mechanism.

In 1989, we received a complaint which was an action by EPA against the principal responsible parties. However, we were brought in as third-party defendants because what had occurred was that the material deposit 1,000 yards to the south had migrated through ground water onto our site and onto this so-called pond that was cleaned up in 1985 by EPA.

And we were told by the complaint that we were strictly liable for—because we owned the property where this Maltex pond was located and we would thus be considered liable for the cleanup.

Shortly after that matter was commenced, the case was settled. We contributed a small amount ourselves in order to avoid further legal costs. The difficulty with this case is that that was just the beginning, that was a $1 million cleanup by EPA.

In November 1992, we received a letter from EPA saying that they had a $50 million plan to clean up the site itself and that since we were one of the principal parties, they wanted us to be aware of what was going to happen. It was as a result of that that we brought this matter to the attention of Congressman Sanders.

That program that has been proposed by the EPA did not take place. It is being reconsidered and reevaluated, but—and we don't know, as Congressman Sanders indicated—what exactly is going to happen. But nevertheless, we are parties who are located 1,000 feet from the site. We owned the property back in the 1970's and here it is in 1993, and we are being told that we may be principally liable because a part of the contamination is located on the property that we once owned.

And that is my statement, Mr. Chairman.

Bob, do you have anything you would like to add?

[The prepared statement of Mr. Shea and Dr. Perrin follows:]

Congress of the United States
House of Representatives
Committee on Government Operations

Environmental, Energy and Natural Resources Subcommittee

November 8, 1993

Written Statement
of
Charles T. Shea, Esq. and
Robert M. Perrin, D.M.D.

This statement is a summary of the past and ongoing experience of the Leverage Group, formerly a Vermont partnership, and its partners with the administration of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA").

I. Preliminary Statement

The superfund site with which the Leverage Group was (and its partners still are) involved, is the so-called "Pine Street Barge Canal Superfund" site, Pine Street, Burlington, Vermont. Attached hereto (Attachment 1) is an Environmental Protection Agency ("EPA") Environmental News Release dated November 6, 1992, which announced a $50,000,000 clean-up plan for the site. Due to strong objections from the community, including several environmental groups, City of Burlington and State of Vermont, the EPA has withdrawn that plan and is now working with state regulators, local officials and community interests to develop a revised clean-up plan.

The basic claim of the EPA is that operators of a since-demolished coal gasification plant located near the site on Pine Street in Burlington, between 1886 and 1967 disposed of coal tar, a byproduct of the coal gasification process, on the property, which is also adjacent to the so-called Barge Canal located between Pine Street and Lake Champlain. See Attachment 2. The original clean-up plan proposed by the EPA would have involved substantial amounts of removal of contaminated ground, plus sediments from the Barge Canal and Lake Champlain; the revised plan is expected to examine more closely the local proposals favoring containment rather than removal.

II. Leverage Group Involvement

In 1970, seven dentists (including Dr. Perrin), one certified public accountant, one attorney (Mr. Shea), and a real estate broker (now deceased) joined together as the Leverage Corporation to establish an investment corporation. One of the investment purchases was the so-called "Maltex property" at 431 Pine Street, Burlington, which was

acquired from Artell, Inc. in 1971.[1] Attached is Figure 2 from the EPA's Proposed Plan, Pine Street Canal Superfund Site (Attachment 2). The approximate boundary of the Maltex property has been drawn in and identified as "Maltex" on the Figure 2 sketch. The Maltex property is located more than 600 yards from where the coal tar was allegedly deposited. The purpose of the acquisition by the Leverage Corporation was solely to rent out the Maltex building, which is located in a commercial and light industrial area on Pine Street. There was no intent to develop, use or rent the remainder of the property, including the area designated as "wetland" on Figure 2, or any portion of the Barge Canal which was arguably part of the property as acquired.[2]

At the time of the acquisition, the Maltex building was vacant and remained so for about a year until the building was rented to a wood furniture manufacturer, Green Mountain Wood Products ("Wood Products"). In 1972, Leverage Corporation was liquidated and the ownership of the Maltex building was transferred to the Leverage Group, a partnership consisting of the Leverage partners. The commercial rental of the Maltex building to Wood Products continued; no use was made of the exterior of the property either by Leverage Group or by Wood Products. The Leverage Group remained a passive landlord until it sold the Maltex property in 1979. Thereafter, Leverage Group had no further interest in the Maltex property.

At the time of the 1971 purchase by Leverage Corporation, and subsequently in 1972, at the time of the corporation's liquidation into the Leverage Group partnership, the Leverage Partners' only knowledge or understanding of the use of the Maltex property prior to its acquisition by the Leverage Corporation, was as a cereal manufacturing facility. Artell, Inc., Leverage Corporation's immediate predecessor as owner of the property, was a small corporation wholly owned by a single shareholder -- Benjamin Greenblott, who then lived and still lives in Burlington. Artell held the property for rental for a period of 18 months, and did not conduct any manufacturing or processing operations. Accordingly, the due diligence investigation conducted on behalf of the Leverage Group in the early 1970's, did not and could not have reasonably produced any inkling of the horrible mess - both literally and legally - which the former Leverage Group partners found they bought into by owning the Maltex property for eight years.

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[1] The "Maltex property" consists of an old brick factory building and mill, with surrounding land abutting the old Barge Canal, which connects to Lake Champlain. The name comes from the fact that it was owned and used by the Maltex Company to mill and prepare cereals; it was the original home of the "Maypo" brand cooked cereal.

[2] Because the old Barge Canal may in fact cut through parts of land that was certifically created during the mid-1800's when the lakeside railroad was first constructed, actual ownership could be disputed under Vermont's recognition of the so-called "public trust doctrine" concerning filled lands.

In 1975, Leverage Group was advised by the EPA that there was an apparent oil contamination problem in the so-called "Maltex Pond," which is partially located on the Maltex property and which may be hydrologically connected to the Barge Canal. The Leverage Group retained an environmental consultant who worked with the EPA to design and carry out appropriate remedial action to alleviate the "oil slick" problem in the Maltex Pond. The Leverage Group, at its own expense, undertook all of that work, with the knowledge and approval of the State of Vermont and City of Burlington, and with the full knowledge and consent of the EPA. When the Maltex property was sold by the Leverage Group in 1979, appropriate disclosures were made to the purchaser, of the 1975 EPA letter referencing "contamination" and of the remedial action undertaken by Leverage Group.

In 1989, ten years after selling the property and 18 years after its initial acquisition, the former Leverage partners were named as third-party defendants in a CERCLA cost recovery action brought by EPA. See United States v. Green Mountain Power Corporation, et al., Civ. Action No. 88-307 (D. Vt.). That case had been originally commenced in 1988 by the EPA to recover the costs of its clean up during the mid-1980's of the so-called "Maltex Pond". Even though the EPA repeatedly stated that it had sued only the former owners and operators of the coal gasification plant as the principal responsible parties, and had no desire to go after smaller adjacent property owners (or former owners), it could not stop those defendants from initiating the chain of indemnification claims allowed under CERCLA which inevitably led to Leverage's involvement in the suit. That matter was eventually settled by all parties involved in the litigation. The Leverage Partners paid a small monetary amount to the EPA as part of a $940,000 settlement by all parties in order to avoid even greater legal costs (the legal costs incurred by the former Leverage partners to date total $16,000), even though the former Leverage partners contended at that time they were innocent purchasers under 42 USCA §§ 9601(35(A) and 9607(b)(3), with respect to the Maltex Pond cost recovery suit. Attached as Attachment 3 is a memorandum prepared by the attorney for Green Mountain Power Corporation (a successor corporation to a former owner/operator of the gasification plant) which provides a summary of the parties involved and the complaint's allegations.

In November 1992, at the time of the EPA's announcement of its original $50,000,000 clean-up plan for the entire Superfund site, EPA served notice on the former Leverage partners as a party "which has incurred or may incur potential liability with respect to the [entire] Pine Street Canal Superfund Site." A copy of the EPA letter is attached as Attachment 4. Mr. Shea, representing the former Leverage partners, sent a response (under date of December 4, 1992) to the EPA advising it of the former Leverage partners' legal position with respect to any alleged liability for the entire Barge Canal Superfund site. See Attachment 5. Dr. Perrin sent a copy of Mr. Shea's letter to Congressman Bernard Sanders, and to United States Senators Jeffords and Leahy. Senator Jeffords then referred Dr. Perrin's letter to the EPA, and the EPA's response to Senator Jeffords is included as Attachment 6. Apparently a consequence of Dr. Perrin's

letter to Congressman Sanders, Dr. Perrin and Mr. Shea have been invited to submit this statement and to testify before this Committee.

Specific Issues and/or Recommendations to Consider

1. Consider elimination of adjacent property owner liability under CERCLA, where the only possible claim is that there has been migration of contamination caused by others onto the adjacent property. See Nurad v. Hooper, 966 F2d 837 (4th Cir. 1992).

2. Consider other ways to clarify or strengthen the so-called "innocent landowner's" exceptions under CERCLA.

3. Consider a statutory requirement in any cost-recovery litigation under CERCLA, especially with respect to third-party indemnification claims, that any party that substantially succeeds in defeating a claim of liability, as a matter of fact, matter of law, or both, shall be entitled to recover its costs of litigation, including reasonable attorneys' and consultants' or experts' fees, and any additional costs of collecting such an award, including further reasonable attorneys' fees.

Respectfully submitted,

Robert Perrin, D.M.D.
Charles T. Shea, Esq.

By: Charles T. Shea
Charles T. Shea

<<CONGRESS.N11>>

Attachment 1

United States Environmental Protection Agency Region I

Office of External Affairs John F. Kennedy Federal Building Boston, Massachusetts 02203

Connecticut Maine Massachusetts New Hampshire Rhode Island Vermont

EPA Environmental News

For more information call

Douglas Gutro, Community Relations, (617) 565-3383
Sheila Eckman, Project Manager, (617) 573-5784

For Immediate Release
November 6, 1992

EPA PROPOSES CONTAINMENT AND LIMITED EXCAVATION OF COAL TAR-CONTAMINATED WASTES AT PINE STREET BARGE CANAL SUPERFUND SITE

BOSTON -- The U.S. Environmental Protection Agency (EPA) today announced an estimated $50 million proposed plan to address contamination at the Pine Street Barge Canal Superfund site in Burlington, Vermont.

The plan calls for dredging all contaminated sediments from the canal; excavating contaminated surface soils; and placement of all of these contaminated materials in a confined disposal facility (CDF). The CDF, which would be constructed on-site in the wetlands west of the former coal gasification plant, would consist of: subsurface vertical barriers to a depth of approximately 40 feet; a passive system to collect mobile, liquid coal tar wastes and a cap which would be placed over all contaminated materials within the CDF. Hydraulic controls, which are engineering measures that control the direction and rate of movement of groundwater, will be installed to collect contaminated groundwater below the CDF. Dredged sediments would be dewatered in the CDF and the water collected from this dewatering and from the hydraulic controls would be treated on-site. Other components of this proposal include: legally binding restrictions to prevent the use of on-site groundwater; on-site wetlands restoration; long-term monitoring, including monitoring of Lake Champlain.

According to EPA Regional Administrator Julie Belaga, "Thorough study and careful consideration have led us to this proposal. This proposal addresses those concerns and considerations offered by the City of Burlington, and other parties potentially responsible for this contamination. We believe this proposal offers an environmentally sound and cost-effective solution to the unique environmental concerns posed by this site. Now, we look forward to receiving constructive input from the citizens of Burlington before making a final decision," said Belaga.

EPA will hold a public meeting on Monday, November 16, 1992 at 7:00 p.m. at Burlington City Hall, Contois Auditorium, to present the agency's preferred alternative as well as all other alternatives evaluated in the Feasibility Study. Approximately one hour of presentations will be followed by a question and answer period.

EPA will be conducting a 30-day public comment period, from November 17, 1992 through December 16, 1992 to provide an opportunity for the public to participate in the selection of the most appropriate alternative to address contamination at the Pine Street Barge Canal Superfund site. During this period, the public is encouraged to submit written comments to EPA on all studies and investigations contained in the Administrative Record as well as EPA's proposed plan.

On December 8, 1992, EPA will conduct an informal public hearing at Burlington City Hall, Contois Auditorium, at 7:00 p.m. to accept oral comments on EPA's proposed plan. The Administrative Record, which contains the documents relied upon by EPA to select this proposal, will be available for public review at the Fletcher Free Public Library by November 9th, 1992.

Written comments should be addressed to:

Sheila Eckman, Remedial Project Manager
U.S. Environmental Protection Agency
Waste Management Division (HPS-1)
JFK Federal Building
Boston, Massachusetts 02203

EPA will review all comments from the public as part of the process of reaching a final decision on how to address contamination at the Pine Street Barge Canal site. EPA's final cleanup decision will be embodied in a document called a Record of Decision (ROD) which will be released after all public comments are carefully considered. A Responsiveness Summary, which is a document containing EPA's responses to comments received during the public comment period will be issued with the ROD. Copies of EPA's proposed plan will be available at Burlington City Hall, Fletcher Free Public Library and at EPA's Records Center, located at 90 Canal Street in Boston, Massachusetts.

The Pine Street Barge Canal Superfund site is located on the eastern shore of Lake Champlain within the City of Burlington, Vermont. The site, which encompasses approximately 50-acres has historically been used for industrial purposes; however, residences; small shops, offices and public parks are located nearby. A coal gasification plant, generating coal tars and other by-products, operated on the site from the turn of the century until the late 1960s. In 1981, the site was proposed for inclusion on EPA's National Priorities List (NPL) of hazardous

-more-

waste sites making it eligible for federal action under the Comprehensive Environmental Response, Compensation, and Liability Act, commonly referred to as the Superfund law. The Pine Street Barge Canal site was officially added to the NPL in 1983. In 1985, EPA removed approximately 1500 tons of coal tar contaminated soil and sediments from a part of the site known as Maltex Pond. In 1986, EPA became the lead agency responsible for investigation of this site. In 1988, EPA used federal funding to commence a Remedial Investigation & Feasibility Study (RI/FS) at the site. An RI determines the nature and extent of contamination at the site and an FS evaluates a range of cleanup alternatives. Various investigations have detected widespread contamination in the wetlands and canal areas. The Pine Street Canal is connected to Lake Champlain, which is a source of drinking water for the City of Burlington and other lakeside communities.

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Attachment 2

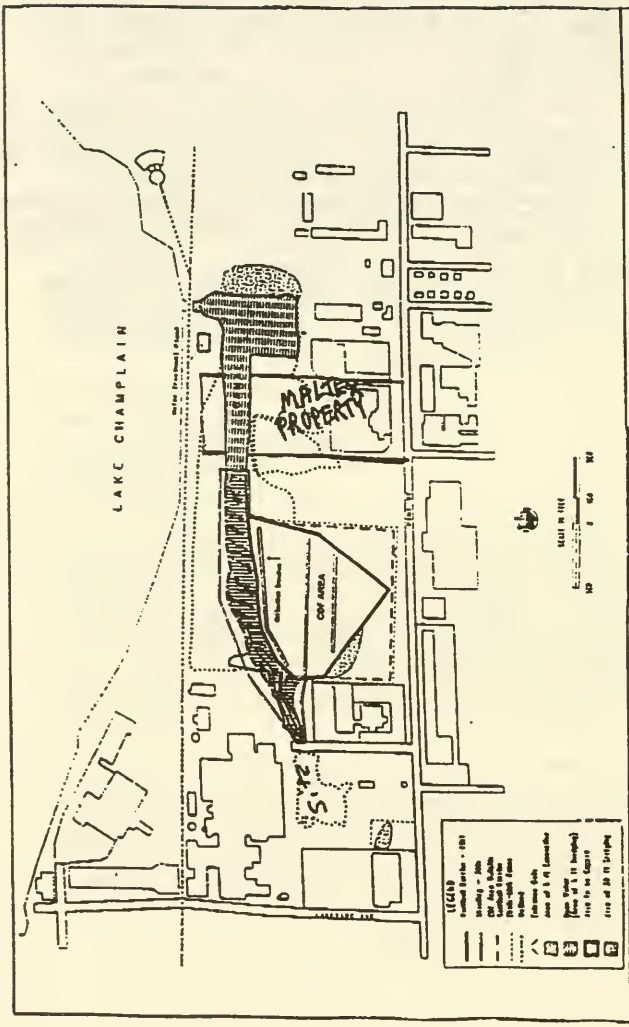

FIGURE 2

PREFERRED CLEANUP ALTERNATIVE CONCEPTUAL SITE PLAN

Source: M&E, October, 1992

Attachment 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 88-307
	)	
GREEN MOUNTAIN POWER CORPORATION, NEW ENGLAND ELECTRIC SYSTEM, and VERMONT GAS SYSTEMS, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM OF DEFENDANT GREEN MOUNTAIN POWER CORPORATION IN AID OF JULY 21, 1989 STATUS CONFERENCE

Defendant Green Mountain Power Corporation ("GMP"), though counsel, submits this memorandum in connection with the status conference scheduled on July 21, 1989. The purpose of this memorandum is to summarize briefly the contentions of the various parties and to inform the Court of the status of this case.

I. Summary of Contentions.

1. Complaint of the United States (R. 1)[1].

The United States commenced this action on December 5, 1988, under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended, 42 U.S.C. § 9601 et seq., to recover approximately $741,000 alleged to have been expended by the United States

[1] "R." refers to the record item number as reflected on the Court Docket Sheet in this action.

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BURLINGTON, VERMONT

Environmental Protection Agency ("EPA") to perform a partial environmental clean-up ("immediate removal action") of an area designated as the "Maltex Pond portion" of the "Pine Street Barge Canal Site" in Burlington, Vermont. The Pine Street Barge Canal Site ("the Site") is alleged to include some 40 acres near the shore of Lake Champlain in the City of Burlington (Complaint ¶ 8). The Site is designated for clean up on the National Priority List promulgated by EPA under CERCLA (id., ¶ 13). The so-called "Maltex Pond" portion of the Site is a small area generally depicted on a map attached to the Complaint (Attachment A). No specific property descriptions of either the Site or the Maltex Pond area have yet been disclosed by the United States. The entire Site is presently the subject of a "Remedial Investigation and Feasibility Study" under CERCLA.

The United States claims that GMP, New England Electric System ("NEES"), and Vermont Gas Systems, Inc. ("VGS") at various times owned and/or operated a coal gasification plant located on the Site. See Complaint, ¶¶ 4-7. The plant, which allegedly operated between 1895 and 1967, when it was allegedly dismantled (id., ¶ 9), was not located on any portion of the Maltex Pond area. The United States claims coal tar, a byproduct of the coal gasification process, is present on the Site and was removed from the Maltex Pond in 1985 (id., ¶¶ 10, 12, 15). According to the Complaint, GMP, NEES and VGS are liable under CERCLA for the

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costs of the removal action in 1985 as "owners and operators" of a "facility" at the time of disposal of "hazardous substances" at a facility, as those terms are defined under CERCLA (id., ¶¶ 26-28). See 42 U.S.C. § 9607(a)(2); see also id., §§ 9601(9), (14), and (20). No defendant has admitted liability; the defendants dispute many of the Government's allegations.

2. Third-party Complaint of GMP (R. 7).

On January 26, 1989, GMP filed its Third-party Complaint against UGI Corporation ("UGI"), Southern Union Company ("Southern Union"), the State of Vermont, and Christine Farrell. GMP brought its Third-Party Complaint under 42 U.S.C. § 9613(f)(1), which expressly permits contribution claims to be made during a CERCLA action to recover response costs. GMP claims that UGI and Southern Union are corporate successors to past owners or operators of the coal gasification plant (GMP Third-Party Complaint, ¶¶ 8-15). GMP claims that if it is liable for the United States' costs, then they also are liable (id., ¶¶ 20-21, 29). See 42 U.S.C. § 9607(a)(3).

GMP claims that if it is liable for the United States' costs, then the State of Vermont and Christine Farrell are liable under CERCLA as owners of property within the Maltex Pond area: (1) at the time of disposal of hazardous substances, (2) at the time EPA undertook its response activities at the Maltex Pond, and, (3) with respect to the

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State only, at the present time (GMP Third-Party Complaint, ¶¶ 16-17, 22-24, 29). See 42 U.S.C. § 9607(a)(1).

3. VGS Third-Party Complaint (R. 9).

VGS filed its Third-party Complaint on February 1, 1989, incorporating GMP's third-party claims and, in addition, adding E.B. & A.C. Whiting Company ("Whiting") as a third-party defendant. VGS alleges that the State of Vermont and Whiting were involved in dredge, fill, and land-farming of hazardous substances at the Maltex Pond in 1968 and 1977 (VGS Third-Party Complaint, ¶¶ 11-14). VGS claims that the State and Whiting are accordingly liable for arranging for the disposal of hazardous substances at the Maltex Pond and that Whiting is additionally liable as an owner or operator of a facility that disposed of hazardous substances at the Maltex Pond (id., ¶¶ 22, 24-15).

4. Third-Party Complaint of Whiting (R. 33).

Whiting, in turn, filed its Third-party Complaint on March 22, 1989, naming all other defendants in this case, as follows:

Heublein Inc., Uhlmann Co., Artell, Inc., Leverage Corporation, Leverage Group[2], and Vermont Development Credit Corporation are alleged to be prior owners of all or a portion of the Maltex Pond area at the time of disposal of

[2]The individual defendants Richard Grundler, Robert Perrin, Charles Hadden, Richard Reed, Stanley Smith, Stuart Jacobs, Robert Watson, Charles Shea, Arthur Morrill, and Sten Fersing are named as partners formerly doing business as Leverage Group.

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hazardous substances there (Whiting Third-Party Complaint, ¶¶ 49, 51-55).

Uhlmann, the City of Burlington and G.S. Blodgett, Co., Inc., are alleged to be liable as persons who, at the time of disposal of hazardous substances, arranged for the disposal or treatment of hazardous substances at the Maltex Pond (id., ¶¶ 50, 56, 57).

5. Responsive Pleadings.

All defendants have answered, with the exception of the State of Vermont, the City of Burlington, Artell, Inc., and Leverage Corp. The answering parties have generally asserted counterclaims and cross-claims for contribution and, in some cases, indemnity among and between each other.

6. Summary.

The parties' claims fall into three categories: (1) claims against entities alleged to be owners or operators of the coal gasification plant (GMP, NEES, VGS, UGI and Southern Union); (2) claims against entities alleged to have otherwise disposed of hazardous substances at the Maltex Pond (State of Vermont, Whiting, Uhlmann, City of Burlington and Blodgett), and (3) present and former owners of the Maltex Pond property (State of Vermont, Farrell, Heublein, Uhlmann, Artell, Leverage Corp., Leverage Group, Vermont Development Credit Corp.).

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II. Pending Motions.

There are two pending motions before the Court.

1. The State of Vermont has moved to dismiss all claims asserted against the State on the ground that it is immune from suit under the Eleventh Amendment (R. 28). The June 15, 1989, decision of the United States Supreme Court in Commonwealth of Pennsylvania v. Union Gas Co. (U.S. No. 87-1241), resolved that issue against the State. Should the State decline to withdraw the motion, it is ripe for resolution and should be denied.

2. The United States has moved to sever or separate third and so-called fourth-party claims (R. 65). GMP and VGS have opposed that motion (R. 92, 93; see also R. 108, 110). NEES does not oppose the motion, so long as the Court also severs all claims asserted against NEES. See R. 82. Three third-party defendants have joined in the motion of the United States or filed independent motions to sever or separate. See R. 87 (Whiting); 107 (Farrell); 118 (City of Burlington). No other parties have responded to the Government's motion.

On May 19, 1989, the United States requested ten days from filing of the last responsive memorandum in opposition to the motion to sever to file its reply memorandum (R. 103). No such reply memorandum has yet been filed.

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Attachment 4

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
J.F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203-2211

CERTIFIED MAIL: RETURN RECEIPT REQUESTED

November 6, 1992

Richard Grundler
31 North Prospect St
Burlington, VT

Robert Perrin
1 Oak Hill Drive
South Burlington, VT

Charles Hadden
1073 North Avenue
Burlington, VT

Richard Reed
311 Malletts Bay Avenue
Colchester, VT

Stanley Smith
RR 1, Box 1170
N. Serrisburgh, VT 05473

Stuart Jacobs
309 College Avenue
Burlington, VT

Robert Watson
200 Van Sicklen Road
South Burlington, VT

Charles Shea
109 South Winooski Avenue
Burlington, VT 05401

Stan Fersing
Biscayne Heights
Colchester, VT

Re: Proposed Plan
Pine Street Canal Superfund Site, Burlington, Vermont

Dear Messrs. Grundler, Perrin, Hadden, Reed, Smith, Jacobs, Watson, Shea, and Fersing (formerly d/b/a The Leverage Group):

As you may recall, you and/or The Leverage Group were named as a third-party defendant in the litigation entitled United States v. Green Mountain Power Corporation, et al., Civ. Action No. 88-307 (D. Vt.), which was brought in 1988 to recover costs incurred by

the United States Environmental Protection Agency in the course of undertaking a emergency removal action at the Maltex Pond portion of the Pine Street Canal Superfund Site, located in Burlington, Vermont.

Because you and/or your company have been identified as a party which has incurred or may incur potential liability with respect to the Pine Street Canal Superfund Site, EPA believes that you may have a special interest in the Site.

EPA is currently in the process of selecting a comprehensive remedy for the cleanup of the Site. In order to ensure that you or your company have an opportunity to participate in the remedy selection process, EPA is mailing you the enclosed Proposed Plan. The Proposed Plan describes the Site, provides an outline of EPA's preferred remedy, and describes the ways in which you, your company and the public may participate in the final selection of a remedy, and the deadlines for such participation. You are invited to comment on the Proposed Plan in accordance with the deadlines therein.

In addition, EPA has created an Administrative Record for the site, containing the key documents upon which EPA's proposed remedy is based. The Administrative Record is available for public inspection at the places and times indicated in the Proposed Plan.

Thank you for your attention to this very important matter.

Sincerely,

Merrill S. Hohman, Director
Waste Management Division

cc: Ross Gilleland, Remedial Project Manager
Michael Jasinski, Remedial Project Manager
Margery Adams, Assistant Regional Counsel
Elissa Tonkin, Associate Regional Counsel
Stan Corneille, Vermont Project Manager
Charles T. Shea, Esq., Gravel & Shea
P.O. Box 1049, 109 South Winooski Avenue
Richard Grundler, Dorset St., Charlotte, VT 05445
Richard Reed, 78 Bartlett Bay Rd.,
South Burlington, VT 05403
Stuart Jacobs, 31 Pine Haven Shore, Shelburne, VT 05403

Attachment 5

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December 4, 1992

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Merrill S. Hohman, Director
Waste Management Division
United States Environmental
Protection Agency
Region 1
J. F. Kennedy Federal Building
Boston, MA 02203-2211

Re: Proposed Plan
Pine Street Canal Superfund Site, Burlington, Vermont

Dear Mr. Hohman:

This refers to your letter dated November 6, 1992 addressed to Richard Grundler, Robert Perrin, Charles Hadden, Richard Reed, Stanley Smith, Stuart Jacobs, Robert Watson, Charles Shea and Stan Fersing (the former "Leverage Partners"), in which you stated that the Leverage Partners have been identified as parties "which have incurred or may incur potential liability with respect to the Pine Street Canal Superfund Site" (the "Site").

It is submitted (i) that the Leverage Partners are not covered parties under 42 USCA §9607 with respect to the site; and (ii) if the Leverage Partners are covered parties under 42 USCA §9607, then they were both "innocent purchasers" and "innocent sellers" under 42 USCA §§ 9601(35)(A) and 9607(b)(3). Accordingly, the Leverage Partners are not subject to any potential liability with respect to the Site.

Background information is appropriate. The former Leverage Partners consist of seven dentists, one certified public accountant, and one attorney. They joined together in 1970 as the Leverage Corporation to establish an investment corporation with one other individual who is now deceased. One of the investment purchases was the so-called "Maltex property" at 431 Pine Street acquired from Artell, Inc. in 1971. Attached is Figure 2 from the EPA Proposed Plan Pine Street Canal Superfund Site. I have drawn in the approximate boundary of the Maltex property and identified it as "Maltex" on the Figure 2 sketch. The purpose of the acquisition by the Leverage Corporation was solely to rent out the Maltex building located on the property. There was no intent to

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develop, use or rent the remainder of the property, including the area designated as "wetland" on Figure 2 or any portion of the Barge Canal which was arguably part of the property as acquired. At the time of the acquisition, the building was vacant and remained so for about a year until the building was rented to a wood furniture manufacturer, Green Mountain Wood Products ("Wood Products"). In 1972, Leverage Corporation was liquidated and the ownership of the Maltex building was transferred to the Leverage Group, a partnership consisting of the Leverage Partners and the deceased individual. The rental of the Maltex building to Wood Products continued. The Leverage Group remained a passive landlord until sale of the Maltex property in 1979.

At the time of the 1971 purchase by Leverage Corporation, and subsequently in 1972, at the time of the company's liquidation into the Leverage Group partnership, the Leverage Partners' only knowledge or understanding of the use of the Maltex property prior to its acquisition by the Leverage Corporation, was as a cereal manufacturing facility. (I am sure you and millions of other Americans are familiar with or remember "Maypo," which was Maltex's principal product; it is difficult to imagine that any reasonable person would suspect that the manufacturer of "Maypo" could result in the deposit or release of toxic chemicals.) Artell, Inc., Leverage Corporation's immediate predecessor, was a solely owned corporation simply which held the property for rental for a period of 18 months, and did not conduct any manufacturing or processing operations. The owner of Artell was Benjamin Greenblott, who still lives in Burlington.

In 1975, Leverage Group was advised by the Environmental Protection Agency (the "EPA") that there was an apparent oil contamination problem in the pond partially located on the Maltex property. The Leverage Group retained an environmental consultant who worked with the EPA to arrive at appropriate remedial action; the Leverage Group, at its own expense, undertook that work with the knowledge and approval of the State of Vermont and City of Burlington and with the full knowledge of the EPA. The Maltex property was sold by the Leverage Group in 1979. Appropriate disclosure was made to the purchaser of the 1975 EPA letter referencing "contamination" and of the remedial action taken. All of this can of course be easily verified.

As stated in your letter, the Leverage Partners were named as third party defendants in the litigation United States v. Green Mountain Power Corporation, et al., Civ. Action No. 88-307 (D. Vt.). That case was brought in 1988 by the EPA to recover costs of the clean up of the so-called "Maltex Pond." That matter was settled with all parties involved in the litigation. The Leverage Partners paid a small monetary amount in order to avoid additional legal costs. However, the same contended at that time they were innocent purchasers under 42 USCA §§ 9601(35)(A) and 9607(b)(3), even with respect to the Maltex Pond suit.

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The Preferred Clean-Up Alternative of the EPA as shown on Figure 1 of the Proposed Plan, does not entail any clean-up work whatsoever on any part of the Maltex property previously owned by the Leverage Partners. The closest actual clean-up activity to the Maltex property as set forth in the Proposed Plan and Figure 1, is the proposed dredging of the Pine Street Canal to a depth of five feet in that portion of the canal located within the Maltex property boundaries. An ill-conceived plan at best, but I will leave to others for now the argument as to why the canal should not be dredged.

The canal and the land underneath it was never owned by the Leverage Partners nor was it under the control of the same. The Leverage Partners thus cannot be considered initially to be covered persons under 42 USCA §9607. The Pine Street Canal was and is navigable or "boatable" waters and is considered part of Lake Champlain. Accordingly, under State of Vermont and City of Burlington v. Central Vermont Railway, Inc. (1989) 153 Vt. 337, 341-43, 571 A.2d 1128, the land under the water in the canal belongs to the citizens of the State of Vermont.[1] The Leverage Partners are not nor never were the owners of a facility as defined under 42 USCA §9601(9), for which the expense of removal or remedial action is to be incurred by the United States Government or anyone else. No remedial action is proposed for the actual Maltex property, only to the Pine Street Canal, and to property owned by others. See Figure 2.

Furthermore, if the Pine Street Canal were to be considered a legal part of the Maltex property (which would be contrary to the holding of the Vermont Supreme Court in Central Vermont Railway, supra), then the Leverage Partners are entitled to the "innocent landowner exception" in that they have complied with all the requirements of 42 USCA §9701 35(A) and (B), as well as 42 USCA §9706(b)(3). According to the Proposed Plan, the primary source of site contamination was the former Burlington Gas Works which was located at least 300 feet south of the Maltex property, and which is a wholly separate parcel of land. The Burlington Gas Works property was not a part of the Maltex property, nor ever used in connection with any operations or process on or at the Maltex property.

At the time of the purchase of the Maltex property by Leverage Corporation in 1971 and subsequently by Leverage Group in 1972, the Leverage Partners did not know that any hazardous substance was in that portion of the Pine Street Canal arguably

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[1]Central Vermont Railway, in its principal reliance on Hazen v. Perkins, 92 Vt. 414, 105 A.249 (1918), makes it clear that "boatable" waters can be created by artificial means, such as a dam (i.e., Hazen) or by excavation (which appears to be how the Barge Canal was constructed). Once navigable waters come into existence, the public takes title to the waters and the land underneath.

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located within the Maltex property boundaries. During their ownership of the property, specifically 1975, the EPA indicated that an oil-related contaminant was entering Lake Champlain through the canal from the vicinity of the Maltex property. Your recent investigation shows that this "contaminant" in fact had migrated from the Burlington Gas Works property. The Leverage Partners nonetheless executed a remedial plan acceptable to EPA and carried out the plan at their own cost and expense and in accordance with EPA's request, along with the knowledge and authorization of the State of Vermont and the City of Burlington. Subsequently, when the Maltex property was transferred, the Leverage Partners disclosed the EPA notification and action taken by the Leverage Partners.

Under the law of the Second Circuit which controls in Vermont, the Leverage Partners clearly fit within the "innocent landowner exemption." See Westwood Pharmaceutical v. National Fuel Gas Dist., 964 F.2d 85 (2nd Cir 1992). According to the Westwood case, in order to qualify under the "innocent landowner exemption" there are two basic tests relevant here:[2]

> **(1) At the time the landowner acquired the property, the landowner did not know and had no reason to know that any hazardous substance was on, in, or at the facility or site; and**
>
> **(2) If the property owner obtained actual knowledge of the contamination after acquisition and then transferred the property, the landowner is required to disclose the knowledge.**

As set forth above, the Leverage Partners qualify under both tests. First, the Leverage Partners had no knowledge of the contaminants in the Pine Street Canal when they purchased the Maltex property and, second, the Leverage Partners advised the subsequent purchaser of the 1975 EPA notification and of the remedial action taken.

In summary, the position of the Leverage Partners is that the recommended remedial action as set forth in the Preferred Alternative of Proposed Plan, insofar as it relates to the Maltex property, involves only the dredging to five feet of a portion of the

---

[2]There is no question that the initial criterion of §101(35)(A) is met, in that the Leverage Partners' acquisition took place well after disposal or release of the hazardous contaminants. Also, their inquiry and "due diligence" at the time of acquisition was, in light of all the facts and circumstances then known, "commercially reasonable" as required by §101(35)(B).

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Pine Street Canal which is not legally part of the Maltex property. Under the law of Vermont, the land and sediments under the Pine Street Canal are owned by the people of the State of Vermont, and the canal bottom was not the property at any time of the Leverage Partners. Even if this view of the law of Vermont does not control (which we do not concede), the Leverage Partners are entitled to the "innocent purchaser exception" of 42 USCA §§ 9601(35) and 9607(b)(3) since they complied with all the requirements for such exemption as enunciated in Westwood, supra.

I am sending a copy of this letter to all parties on the list of potentially responsible parties your office has provided, so that they will all be on notice of our position and act accordingly should future litigation prove unavoidable.

Cordially,

GRAVEL AND SHEA

Charles T. Shea

CTS:wla

Enclosure

cc: All Parties

Attachment 6

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
J.F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203-2211

March 1, 1993

The Honorable James M. Jeffords
United States Senate
Washington, DC 20510-4503

Re: Pine Street Canal Superfund Site
Burlington, Vermont

Dear Senator Jeffords:

Thank you for your January 22, 1993 letter on behalf of the partners of the former Leverage Group.

First, let me clarify that based on the information currently in EPA's possession, EPA has not identified the partners of the Leverage Group as potentially responsible parties ("PRPs") at the Pine Street Site. As discussed below, however, the question of whether the Leverage Group partners may be liable under CERCLA is very fact-specific. Some of the other PRPs at the Pine Street Site disagree with EPA's conclusion that the Leverage Group partners (and other prior landowners) are not PRPs. In fact, in the 1989 - 1991 litigation relating to the Maltex Pond area of the Site, some PRPs sued the Leverage Group partners as third-party defendants, on the theory that the Leverage Group partners are liable under CERCLA.

Although EPA has not named the Leverage Group partners as PRPs, we have tried to keep them apprised of the status of the Pine Street Site in order to ensure them an opportunity to comment on EPA's activities at the site. Specifically, on November 6, 1992, EPA sent the Leverage Group partners (and other former landowners) a copy of EPA's proposed remedy for the site and solicited their comment and input into development of a remedy.

Briefly, the facts surrounding the Leverage Group partners' connection to the site are: from 1971 - 1972, the Leverage Corporation owned three parcels of property at the site (identified in title documents as parcels 431, 12-73 and 12-83). These parcels include the Maltex Building and areas directly behind it on both sides of the Barge Canal. The lots were sold to Leverage Group in 1972, which owned them until 1979. As documented in the Remedial Investigation reports, the property formerly owned by the Leverage Corporation and the Leverage Group partners is contaminated with coal tar wastes.

Under Section 107(a)(2) of CERCLA, a person is liable if he or she owned or operated a facility (i.e., a portion of the site) at the time that hazardous substances were disposed at the site. In this case, the gas plant was decommissioned in 1967, and active disposal of wastes from the plant ceased before the Leverage Corporation or the Leverage Group bought property at the site. From information available to us, it does not appear that the Leverage Corporation or the Leverage Group actively disposed of the coal tar wastes (e.g., by moving contaminated soil from one area to another) during 1971 - 1979. However, as Mr. Shea's December 4, 1992 letter states, there is evidence of migration of coal tar related wastes on the Leverage Group property during the 1971 - 1979 period. In fairly similar situations, some courts have held that former landowners are liable under CERCLA where there was passive migration of contaminants on their property during the time of their ownership. See e.g., Nurad v. Hooper, 966 F.2d 837 (4th Cir. 1992), cert. denied sub nom Mumaw v. Nurad, __ S.Ct. __ (Oct. 19, 1992). Other courts have refused to interpret CERCLA in this manner. See e.g., Snediker Developers Lt'd Partnership v. Evans, 773 F. Supp. 984, 988 (E.D.Mich. 1991).

In addition, the "innocent landowner" defense set out in Sections 107(b) and 101(35)(A) may apply if: the landowner acquired the property after the release of hazardous substances; at the time of purchase the landowner did not know or had no reason to know that any hazardous substances had been released on the property; the landowner exercised due care with respect to the hazardous substances concerned, in light of all the facts and circumstances; and, finally, the landowner took precautions against foreseeable acts or omissions of third parties, and the consequences of those acts. The Leverage Group partners assert that they meet the requirements of the innocent landowner defense.

Based on these considerations, EPA Region I has concluded that it would not be appropriate to identify the Leverage Group partners as potentially responsible parties. Because other PRPs may attempt to bring the Leverage Group into a settlement or litigation, however, EPA believes that it must take specific steps to notify the Leverage Group of their rights to comment on EPA's proposed action.

James M. Carey
President and Publisher
Ronald L. Thornburg
Editor
Judith Diebolt
Managing Editor
Candace Page
Editorial Page Editor
Stephen Kiernan
Editorial Writer
Edward Bartholomew
Controller

Friday, February 12, 1993 ■ Edit

A dump as big as the mall

Vermonters must speak with one voice if they are to stop the U.S. government's plan to put a hazardous waste dump bigger than University Mall on the Burlington waterfront.

The Superfund law grants the U.S. Environmental Protection Agency extraordinary powers. The EPA can impose a cleanup plan and force local government and businesses to pay for it. Once the EPA decides, it's almost impossible to appeal.

Unfortunately, the EPA's plan to "clean up" the Pine Street Barge Canal in Burlington won't really clean up. On the basis of flawed and inadequate studies, the EPA plans to spend $50 million digging up one part of the Superfund site and piling it elsewhere in the polluted wetland.

The pile — 25 feet high and 13 acres in area — will cover more land than the 11 acres of buildings at University Mall in South Burlington.

Vermont has one hope of stopping this super-foolish solution. The law requires EPA to weigh state and local opinions before settling on a cleanup plan. In at least one Superfund case, in Aspen, Colo., local opposition forced the EPA to drop its plans to dig up a contaminated site.

The EPA listened because Aspen citizens mobilized. At the citizens' urging, outside scientists evaluated the site and concluded there was no immediate risk to residents.

We've yet to hear a single voice raised in Vermont to support the EPA's plan. But so far Vermonters haven't agreed on what should be done instead.

State government and a group of businesses potentially liable for the cleanup costs are pushing a less expensive cleanup that would still cost at least $25 million. Some of those parties say they would prefer to leave the wetland as is, but don't think that's a politically credible stand.

Environmental groups are studying the EPA's work and haven't taken a position yet. Only Mayor Peter Clavelle is saying out loud that the best action at the Barge Canal is no action except monitoring and more studies.

According to the EPA, the Barge Canal poses no immediate risk to humans or the ecosystem beyond the boundaries of the Pine Street wetland. Certainly more studies are needed, since the EPA's can't be relied on. But unless additional scientific data identify some greater danger, Clavelle's approach is the right one.

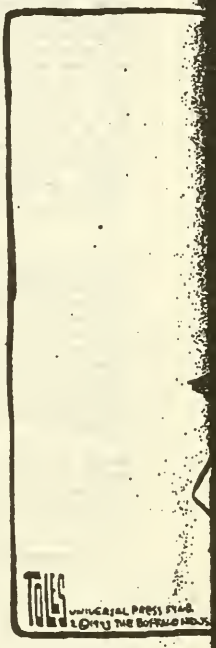
The EPA will accept comments until mid-May. Before then, state government, environmental groups, the city and other parties ought to devise a common position: Leave the polluted peatland untouched until someone proves there's an environmental threat that justifies a $50 million solution.

Speak out on the Barge Canal

The U.S. Environmental Protection Agency is required to weigh "community acceptance" before adopting a Superfund cleanup plan. Vermonters can

JFK Building (HPS-CAN1)
Boston, Mass. 02203

The Free Press Opinion section plans to print a round-up of readers' responses to the EPA's



Truck safety

In response to the editori
(Jan. 2), please let us not con
the issues of truck safety. Fift
percent of trucks do not have
brakes. Maybe 50 percent of
trucks have brakes that are o
adjustment. This is easily rem
died in about 15 minutes any
where the vehicle may be par
... Realistically, a driver coul
leave his home terminal and
all his brakes within the legal
limit and at the end of a 10 c
hour day, depending on how
ten he uses his brakes, he ma
have one brake beyond the a
table legal tolerance. This is
to say that the brake will no
work, it just does not work a

SUPERFUND: *History of the canal*

BAZILCHUK

A FREE PRESS INVESTIGATIVE REPORT

Barge Canal – gas industry's toxic legacy

Contamination is byproduct of 58 years of turning coal into gas

The Pine Street Barge Canal has been posing headaches for state officials since at least 1968, when on July 15 a greasy glob of coal tar oozed from the canal into Lake Champlain.

Then, as now, one of the biggest problems was finding money to clean up the mess.

"Our biggest problem this time was in trying to obtain operating funds to buy $80 of equipment," wrote W. William Martinez of the Vermont Water Resources Department in a memo to his boss, A. William Albert.

The goo that escaped into the lake was a fraction of the residue left from a coal gasification plant that operated from 1908 to 1966. The gas was used for heating, lighting and cooking.

"I remember the gas," said Richmond Bartlett, a University of Vermont soil scientist who moved to Burlington in 1958. "It was awful, smelly stuff."

The gas, called water gas, was made by passing steam through hot coke, a form of coal. Later the process was improved by adding a step to enrich the gas. In the enrichment process, oil was sprayed on hot bricks; the gas from this was combined with the water gas.

The process was common across the United States — more than 1,500 communities operated major coal-gasification plants. There are likely many more, said C. Richard Bozek, manager of environmental programs for the Edison Electric Institute, an association of investor-owned utilities.

"At the turn of the century that was the way to produce gas lights in the city," he said. "And because there wasn't a good distribution system, they were very near the cities."

But there were leftovers — coal tar and iron-impregnated wood chips that were used to filter the gas. The Burlington site bordered on a wetland and a long Barge Canal, both considered wastelands ideal for dumping industrial trash. The Barge Canal, itself a relic of an earlier industrial age, was built in the early 1800s to harbor barges bringing wood from the Adirondacks to the mills on Pine Street.

Consequently, owners, including Green Mountain Power Corp., dumped or spilled coal tars behind the plant for about 40 years.

Starting in the 1940s, the coal tar residues were sold, to Cabot Paint, among others, for use as a stain. The residues also were sold for use as asphalt and roofing sealer.

But like any other fossil fuel product, the coal tars and associated, wastes don't belong in Lake Champlain.

After the July 1968 incident, state and city officials, and representatives from local companies tried to decide how to handle the mess.

A Vermont Gas Systems official stated that "additional oily wastes were recently dumped in this area," although the practice had been stopped, says a July 23, 1968 memo from the Water Quality Section to section chief Albert.

"(Then) Commissioner (R.W.) Thieme emphasized the seriousness of this problem," the memo continues, "and that a permanent solution to remove or contain the oil wastes in their present location must be found."

A week later, Martinez came up with a $5,000 solution: use a vacuum truck to remove the contaminated materials and fill in with sand.

Martinez didn't have any idea of how much material there was to clean up, but he estimated that it would take three men two weeks.

Martinez's plan was never adopted. Even if it had been, state workers would have found thousands of tons of coal tar. And it's unlikely, given the science and technology of the late 1960s, that state officials could have returned the site to a pristine state.

That was the first of many plans to clean up the canal. It was the simplest, and also the cheapest. Twenty-five years later, estimated cleanup costs have ballooned to 10,000 times the 1968 proposal, or $50 million.

Dr. PERRIN. Charlie has certainly summarized the events quite well. I sometimes wonder if maybe my doctorate should be in toxicology instead of dentistry. But it was certainly a good example for those of us who are normally not involved with this type of thing to see how this system works. And it was quite appalling.

In our local newspaper, we had great summaries of what had happened from the beginning of this up to date, and as Congressman Sanders just stated earlier, at about $6 million spent just in research, I believe. That does not include any legal fees.

I don't think we have any idea of what is concerned in legal fees because of all the companies that are involved. But it certainly is an eye opener to realize that tax dollars and private sources and what have you are being spent on something which has produced basically no results.

Mr. SYNAR. Let me thank all three of you gentlemen. I might point out that all three of you came at your own expense and time and that is something which I think additionally shows the commitment that you have to trying to make changes.

The Chair recognizes himself for 5 minutes.

Mr. Gibbs, let me start with you, if I could. You noted that Webco disposes of acids, caustics, and machine coolants which are the byproducts of the steel tubing process. Is that correct that you started basically putting it in the Hardage landfill in 1974?

Mr. GIBBS. Yes, Mr. Chairman.

Mr. SYNAR. Now, did you all check with State and local officials on how and where you were to dispose of this type of waste?

Mr. GIBBS. It is my understanding that there were people at Webco that did select this site based on the premise that it was a licensed site. As to whether anyone from Webco ever actually spoke to anyone at the State about the site or not, I do not know. I did not work for Webco at the time.

Mr. SYNAR. But you all don't consider yourselves polluters if you checked on at least on how to comply, correct?

Mr. GIBBS. Certainly not. We are not polluters. We did go to the only licensed site in the State.

Mr. SYNAR. You noted in your testimony that the landfill operated from 1972 to 1980. The site was proposed for placement on Superfund's national priority list in 1981, and finally listed by EPA in 1983.

Mr. Gibbs, how many potential responsible parties are involved in the Hardage site?

Mr. GIBBS. My understanding, initially, is there were about 400. Now there are about 29 left.

Mr. SYNAR. All right. With all those parties that are responsible to contribute, how far along are we on the cleanup since 1983?

Mr. GIBBS. Hardly any. Most of the costs incurred have been transactional costs. Some of the costs have been for collection of data needed to design the remedy. A lot of those data were used by the PRPs to fight the EPA. The PRPs thought the EPAs remedy would be ineffective.

Mr. SYNAR. So after 10 years, we are only now beginning to move dirt?

Mr. GIBBS. Exactly.

Mr. SYNAR. What has caused all that delay in your estimation?

Mr. GIBBS. A lot of it has been difficulty in dealing with the EPA. Like I said, the EPA initially wanted a very expensive remedy and not only was the remedy very expensive, most of the technical representatives of the PRP companies didn't feel that remedy would be protective of the environment.

Mr. SYNAR. From our records, it looks like the committee, the PRP committee, spent over $40 million in legal and other related fees, that the remedy offered by EPA was $54 million. So even after spending $40 million in legal fees, they are still spending far less than had they simply accepted EPA's preferred remedy.

How much are you going to likely spend at this site?

Mr. GIBBS. Webco will likely be out about a half million dollars at this site. Maybe three quarter million. It is hard to tell.

Mr. SYNAR. That is not a productive use of your company's resources, is it?

Mr. GIBBS. Absolutely not.

Mr. SYNAR. How much did it cost you to dispose of the 75,000 gallons at the site initially?

Mr. GIBBS. About 5 cents per gallon.

Mr. SYNAR. How much is it costing you to clean it up?

Mr. GIBBS. Our share will come out to about $10 per gallon.

Mr. SYNAR. Are there so-called orphan shares at the site? Has EPA discovered who any of those people are?

Mr. GIBBS. There are a lot of orphan shares at the site. I am not sure how many. A lot of gallons were taken to Hardage by companies no longer in business or can't be located.

Mr. SYNAR. So what do you recommend that we do with orphan shares?

Mr. GIBBS. I think the EPA should invoke mixed funding and start to use the Superfund a little more readily in cases like this rather than apply joint and several liability to the viable PRPs.

Mr. SYNAR. Webco is also involved in the Sand Springs Petrochemical Complex NPL site. How were you brought into that site?

Mr. GIBBS. We were third-partied into that site, I believe. The EPA initially sued some parties. The Atlantic Richfield Co. is the party that comes to mind as being the primary PRP at the site. The way the Superfund program is set up, the larger parties initially sued by the EPA sue other parties, and then those third parties can sue other parties and so forth. My understanding is that seventh party lawsuits have been initiated at some of these sites.

Mr. SYNAR. Was the material that you sent there hazardous waste?

Mr. GIBBS. The material that we sent to Hardage was an acid, so it would be a hazardous waste, although there weren't any metals or other contaminants in the waste. The waste had a low pH. The material sent to the Sand Springs site was an oil-based coolant with no hazardous substances in it.

Mr. SYNAR. You said the liability issues have yet to be resolved at the Sand Springs site. Why is that?

Mr. GIBBS. It is primarily because of the way EPA has handled negotiations. The EPA elected to deal exclusively with the Atlantic Richfield Co. and, despite concerted efforts by our PRP steering committee, we are kept in the dark about the nature of those negotiations.

We have been on the brink of settlement beginning 4 years ago, approximately, and we have been there at least three or four other times since then and all of those settlements have gone away at the last moment.

Mr. SYNAR. Once you settle your third-party litigation with ARCO, are you out clear and free?

Mr. GIBBS. No, it is not likely we will ever be out clear and free from either of these sites.

Mr. SYNAR. You noted in your testimony that the Superfund's law liability provisions have affected your potential opportunity to purchase property. What does that mean?

Mr. GIBBS. Yes. We have leased a warehouse with an option to purchase for several years. When we attempted to exercise that option to purchase, we did like everyone else does, and we obtained an independent real estate environmental audit for the property transfer.

When we obtained that audit, of course it showed that the site was almost contiguous with the Superfund site and lenders have been very hesitant to have anything to do with a site that is near a Superfund site. The threat of liability is so great that they just can't get anyone to loan money on property like that.

Mr. SYNAR. Now, you are going to spend about $2 million at both sites, correct?

Mr. GIBBS. Yes, we could do that.

Mr. SYNAR. All right. Now, given the expense and the headaches that you have found through your personal experience, and the uncertainty of the future liability, I guess the last question I want to ask you is: Would you be willing to pay a higher fee to get out from under all past liability permanently?

Mr. GIBBS. Yes, that would be a very desirable goal for us to be out of there permanently because the way things are right now, we don't know how much we will eventually have to pay and this situation will probably continue for 20, 30, 40 years, possibly. So if we had a fixed sum, that would be presented to us as being a way out of this permanently, I think that that would be seriously considered.

Mr. SYNAR. Thank you, Mr. Gibbs.

Mr. Sanders for 5 minutes.

Mr. SANDERS. Thank you, Mr. Chairman.

Dr. Perrin, as I understand it, when your group of partners purchased the Maltex building, you had no idea that anything toxic was present; is that correct?

Dr. PERRIN. That is correct.

Mr. SANDERS. How did you feel when EPA told you in the mid-1970's, therefore, about the apparent oil contamination in the Maltex pond? Do you feel that you were at fault at that time?

Dr. PERRIN. I am sorry, did we feel what?

Mr. SANDERS. Did you feel that you were at fault?

Dr. PERRIN. No.

Mr. SANDERS. Nevertheless, as I understand it, you undertook work in 1975 to deal with the oil contamination problem; is that correct?

Dr. PERRIN. Yes.

Mr. SANDERS. Now, when you were named as a third-party defendant in the EPA suit against Green Mountain Power and others in 1989, as I understand it, you were not actually named by the EPA as responsible; is that correct?

Dr. PERRIN. That is correct.

Mr. SANDERS. OK. As I understand it, you were just at the end of a chain of passing the buck from EPA to Vermont Gas Systems to E.B. & A.C. Whiting down to you. Is that the way it went?

Dr. PERRIN. Yes.

Mr. SANDERS. Let me just ask you a question. Do you think that your problems with this matter are now finally settled?

Dr. PERRIN. Suspiciously not convinced.

Mr. SANDERS. That is why you are here today. Could you also perhaps give us a guess, an estimate if you might, as to how much time or money this whole matter has cost you and the others in the group?

Dr. PERRIN. At this point, we are in about the $20,000 area estimate. These are individuals, in cash, yes.

Mr. SANDERS. Charles, Mr. Shea, let me ask you a few questions. You are the attorney for the group of dentists as well as one of their former partners. Based on your legal knowledge as well as your experience with the case, could you tell us what provision of the law led to these people being dragged into the Superfund process in 1989?

Mr. SHEA. Well, it was the strict liability provision which states that if you are an owner of a facility and, for the record, the—the 1989 case involved a small cleanup on the Maltex property itself as a result of the migration from the site itself.

Mr. SANDERS. What would be the effects on the efficiency in your judgment of the Superfund cleanup process if the law were changed to prevent such groups from being included as Superfund defendants in the future?

Mr. SHEA. Well, I think that it would—I think it is important that that is done and I realize that there may be—there requires some investigation to ensure that a person isn't truly an innocent owner or an innocent purchaser, but I believe that there should be a mechanism for accomplishing that and if that is done, that avoids this numerous third-, fourth-, and fifth-party situations.

Mr. SANDERS. Right. You have made the case earlier that you were actually, in a sense, innocent landowners and innocent purchasers under the law and thus exempt from responsibility. But apparently, as I understand it, innocence or guilt didn't seem to be a basic question in this Superfund process as it actually operates. Would that be a fair statement?

Mr. SHEA. That is true, Mr. Sanders, and let me just say that that really is where all the expense comes in. In our case, they were immediately into settlement negotiations so we didn't have to even go through the discovery, but if you are going to be involved in trying to prove you are not responsible in a $50 million settlement, you can imagine the amount of discovery, legal work that is required to get there, so there has to be an early decision on whether an individual—whether parties are innocent. It has to be done early before they are required to go through the full discovery

process of finding out exactly what is wrong and who is going to clean it up.

Mr. SANDERS. OK. I just want to thank both of you for coming here today and for your help in trying to allow us to get the to root of the problem. Thank you.

Mr. SYNAR. Mrs. Thurman.

Mrs. THURMAN. Mr. Gibbs, in your testimony, just for my sake, you talked about the first hazardous disposal waste being permitted. Who permitted that?

Mr. GIBBS. That was by the State Department of Health, Oklahoma.

Mrs. THURMAN. Did EPA have any jurisdiction at that time of looking at any hazardous wastesites.

Mr. GIBBS. I believe the Oklahoma State Department of Health had primacy over the RCRA program of that era. I don't think the Federal EPA was involved in licensing or permitting of that site since the Federal RCRA program was not active before 1978.

Mrs. THURMAN. So did the State when they—when EPA came in, did they give you any assistance since they were the permitters of this site?

Mr. GIBBS. No. The EPA, as far as I know, didn't give us any assistance.

Mrs. THURMAN. Did the State give you any assistance?

Mr. GIBBS. The State has been on our side. In fact, the State of Oklahoma people were instrumental in helping us to gain the remedy that will be implemented at the site. They were very helpful to us.

Mrs. THURMAN. Thank you. One other thing that I am not sure that I understand is how it took place. When EPA was involved with the negotiations with one of these—but yet you all were kind of left out on the outside. Tell me what happened on that. I just——

Mr. GIBBS. OK. That is an oil refinery owned by or first operated by Sinclair Oil Co. as I understand. ARCO bought the property. The property is about 200 and some acres in Sand Springs, OK. The refinery operations, if I recall, were ceased in the 1950's, maybe 1940's, before ARCO bought the property. I am not sure when they bought it, but the property was already contaminated.

And on this property there was about a 5 acre site where the waste oil reclamation facility was located. So when the site first was placed on the NPL list, the EPA decided to deal with largest PRP only. That would be ARCO because they had responsibility for the entire site, and this 5 acre section was just a small part of the entire site.

So EPA said, my understanding is EPA told ARCO that since they had agreed to clean up the whole site including Glen Wynn, then ARCO will be the party EPA negotiates with. The rest were left in the dark. We wanted to settle, wanted to settle our liability and go on, but we have not been able to because of ARCO's reluctance to settle.

Mrs. THURMAN. Dr. Perrin, I just want to tell you that there are some similar situations in Florida right now, so don't buy any property down there anytime soon, either. Where we can't get people to—where there have been pieces of property where old gasoline

stations have been sitting, the liability issues are still sitting there, they are not able to get anything done, but we did—when we passed the legislation on abandoned tanks, we at least gave the money available to do the cleanup so we could take care of some of these liability problems. I am sorry this is all happening to you. I know it is very frustrating.

Mr. SYNAR. Mr. Shea, in your testimony, you said that any party who substantially succeeds in defeating a third-party indemnification claim should be entitled to recover its costs in litigation including attorneys and consultant fees.

How would that have helped you?

Mr. SHEA. I think it is this way. As an attorney and when you are discussing the potential claim that an individual may have, if they have a contract which provides that they are not going to—that if they are not successful, they may end up having to pay the legal fees for the party that is successful, I think they would give a little bit more credence to whether in fact the factual pattern being submitted by the third party is accurate.

For example, in our case, if we were brought in but there was the innocent purchaser exemption, we fit clearly within it yet we are being sued, brought into immense litigation, had the party that brought us in been aware that they would be responsible for our costs, I believe they would not have brought us in.

Mr. SYNAR. One other thing you suggested is to strengthen the innocent landowner exception in the law by eliminating adjacent property liability of victims of migration. How would that work?

Mr. SHEA. Well, Mr. Chairman, as you know, the law has been interpreted that disposal means and includes the migration underground of contamination. Thus, if you have nothing to do with it and you are an adjacent property owner and because of ground water the contamination comes to your property, you are under the law strictly responsible to clean that up.

It seems to me that, again, we get back to your opening statement which is, let's charge the polluter with the liability as opposed to the innocent property owner. And that really is the theory there.

Mr. SYNAR. Well, thank you very much, all three of you. Again, let me express our personal thanks for you coming up at your own expense to testify today, and I think the stories you have told us today are illustrative of what we are seeing and hearing around the country.

As Mrs. Thurman said, I think they set the stage for the reasons why major reconsideration of this law is necessary. So I thank all three of you.

Our second panel this afternoon will be Mr. Keith Fultz, the Director of Planning and Reporting, U.S. General Accounting Office; Ms. Katherine Probst, fellow, Center for Risk Management, Resources for the Future; and Ben Chavis, executive director of the NAACP.

If the three of you would please come forward. Welcome. As you saw from the previous panel, we swear in all of our witnesses in order not to prejudice past or future panels.

Do any of have you an objection to being sworn? If not, would you stand and raise your right hand?

[Witnesses sworn.]

Mr. SYNAR. Why don't we begin with you, Keith, if we could. Again, welcome back, and your entire testimony will be made part of the record. And at this time, we would ask you to summarize in about 5 minutes.

STATEMENT OF KEITH O. FULTZ, DIRECTOR, PLANNING AND REPORTING, RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION, U.S. GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY JAMES A. DONAGHY, ASSISTANT DIRECTOR, ENVIRONMENTAL PROTECTION ISSUES

Mr. FULTZ. I will be able to do that, Mr. Chairman. I would like to introduce my colleague to my left, Mr. Jim Donaghy, who has done a lot of work in the Superfund area over a number of years.

Mr. Chairman, and members of the subcommittee, we appreciate the opportunity to discuss our views of the tools authorized for the Superfund laws for reducing transaction costs. These tools include de minimis settlements, nonbinding allocations of responsibility referred to as NBARs, fixed funding agreements, and alternative dispute resolutions called ADRs.

In summary, we have found that, overall, EPA has made little use of the settlement tools which Congress gave them back in 1986. Out of about 1,100 non-Federal sites, EPA had completed de minimis settlements at only 73, prepared NBARs at 5 sites, used mixed funding arrangements at 16, and employed alternative dispute resolution techniques at only 35 sites. In fact, the chart to your left shows by region the use of these settlement tools.

And just to highlight a few of the observations that we picked up, two regions, regions one and five, account for about half of all of the de minimis settlements that have been used over the years. Again, two regions, one and five, did most of the ADRs. And if you look at the middle column there, seven actually never used NBARs at all.

The reason these tools have not been used very much, quite frankly, is because EPA has been concerned with getting as many cleanups under way as quickly as possible and they viewed the settlement tools as taking enforcement away from this effort.

I think recently, and especially most recently, following widespread complaints about high transaction costs, EPA has begun to give the settlement tools higher priority. But further action is needed to make transaction costs an integral part of the Agency's operation.

Mr. Chairman, since Congress provided EPA with tools to expedite Superfund settlements over 7 years ago now, the Agency has done little to promote their use and has not placed emphasis on the need to reduce transaction costs. They are paying more attention to controlling these costs recently, however.

In June, plans were announced for overcoming many of the obstacles minimizing their use. For example, they now have set goals and have required regions to identify candidates for de minimis settlements. They have announced pilots to explore the use of ADR and NBARs and they have plans to reexamine the possible roles of mixed funding and mixed funding procedures.

We think that EPA's actions are evidence of the new concern for controlling Superfund transaction costs, but whether they will bring down the cost significantly will depend on how well EPA manages the implementation of its plans.

Before EPA can make more effective use of the tools, however, it needs to work toward creating an enforcement attitude that is concerned with reducing the transaction costs for Superfund's responsible parties. To do this, we would suggest that they systematically determine when the tools can actually be used. They need to create regional accountability for their use, target resources, review their administrative procedures, and make effective parties more aware that these tools are available.

Now, as you and other members have stated, Mr. Chairman, the present Superfund legislation is going to expire in the next year and various proposals have already been suggested that would substantially alter its present liability system.

I would like to make it clear that the GAO is not opposed to statutory changes at all. However, it is possible to reduce transaction costs and improve the fairness of the program through the use of existing settlement tools that Congress gave EPA back in 1986.

Now, in the next several months, GAO will issue two reports that will help congressional deliberation on this subject. The first will present our recommendations to EPA on how the use of settlement tools can be improved. And the second will present the results of our survey of transaction costs for the largest PRPs, that is both Fortune 500 industrial and service companies. Then, I think for the first time we will have an idea of how expensive transaction costs are.

In considering the proposals already suggested as well as others that might be introduced, we suggest the merits of each of the proposals be judged against the following standards or criteria. I put these in the form of questions.

First would be, how will the speed of cleanups be affected? And I think you raised concerns about that in your opening comments, Mr. Chairman.

Does the proposed system assign responsibility to cleanup to those who caused the contamination? Will a transaction cost actually be reduced or merely transferred from one party to another? Will the change improve the fairness by which responsible parties are treated, particularly small waste contributors, some of which we have heard here this afternoon? And what will the costs mean for the Federal Government?

We have heard estimates that the Federal expenditures could go up substantially under some of these proposals. Would the change impact on the present incentives for voluntary cleanup and responsible waste management practices? I think last but not least, will EPA be able to effectively manage the program under the new system?

Mr. Chairman and members, that concludes my summary. I would be pleased to respond to questions when my other panel members are finished.

Mr. SYNAR. Thank you very much, Mr. Fultz.

[The prepared statement of Mr. Fultz follows:]

United States General Accounting Office

GAO

Testimony

Before the Subcommittee on Environment, Energy and Natural Resources
Committee on Government Operations,
House of Representatives

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SUPERFUND

Limited Use Made of Techniques to Reduce Legal Expenses

Statement of Keith O. Fultz
Director of Planning and Reporting
Resources, Community, and Economic Development Division

GAO/T-RCED-94-74

Mr. Chairman and Members of the Subcommittee:

We appreciate the opportunity to discuss possible ways to reduce the costs of resolving liability for cleaning up hazardous waste sites in the Environmental Protection Agency's (EPA) Superfund program. Parties responsible for cleaning up these sites have complained that these costs, which are sometimes called transaction costs, are excessive. At the request of this Subcommittee and other Committees and Members of Congress, we have reviewed and testified on EPA's use of the tools authorized by the Superfund laws for reducing transaction costs.[1]

These tools include (1) de minimis settlements--expedited settlements for parties that have contributed comparatively small amounts of low-toxicity waste; (2) nonbinding allocations of responsibility (NBAR) for cleanup costs by EPA to responsible parties; (3) mixed-funding agreements between EPA and responsible parties to share cleanup costs; and (4) alternative dispute resolution (ADR)-- the use of neutral third parties to help resolve

[1]Superfund: Little Use Made of Techniques to Reduce Legal Expenses (GAO/T-RCED-93-60, June 30, 1993), Superfund: EPA Could Do More to Reduce Responsible Parties' Legal Expenses (GAO/T-RCED-93-73, Sept. 28, 1993) and Superfund: Techniques to Reduce Legal Expenses Have Not Been Used Often (GAO/T-RCED-94-44, November 4, 1993).

liability and cost allocation problems. (See app. I for a description of these tools.)

In summary we found that:

-- EPA has made little use of the settlement tools overall. Out of 1,074 nonfederal sites,[2] as of September 1993, EPA had completed de minimis settlements at only 73 sites, prepared NBARs at 5 sites, used mixed-funding arrangements at 16 sites, and employed alternative dispute resolution techniques at 35 sites.

-- The tools have not been used much, primarily because EPA has not made a sustained effort to encourage its regional offices to use them. EPA has mainly been concerned with getting as many responsible-party-financed cleanups under way as quickly as possible and has viewed the settlement tools as drawing enforcement resources away from this effort. In addition, according to most regional officials we interviewed, EPA's use of the settlement tools has been limited by restrictive administrative procedures that made the tools difficult to implement.

[2]As of September 1993, 123 of the 1,197 final sites on the National Priorities List (EPA's inventory of Superfund sites) were federal sites, and 1,074 were nonfederal sites. The tools for controlling transaction costs are designed primarily for use at nonfederal sites.

-- Recently, following widespread complaints about high transaction costs, EPA began to give the settlement tools higher priority. However, EPA's effort at this point is not fully operational but mostly involves pilot projects at selected regions. As we will discuss, further action is needed to make efforts to reduce transaction costs an integral part of the agency's operations.

-- While we generally support efforts to lower transaction costs through more effective use of the settlement tools, we caution that expanded use of one of these tools--mixed funding--could be expensive for the government and could complicate, rather than simplify, settlement negotiations.

BACKGROUND

Before discussing these issues in greater detail, I would like to briefly provide some background on the transaction cost problem.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) authorizes EPA to compel parties responsible for Superfund sites to clean them up or to reimburse EPA for its cleanup costs. Courts have interpreted responsible party liability under Superfund to be strict, joint and several, and retroactive. Under strict liability, a party may be liable for

cleanup even though its actions were not considered negligent when it disposed of the wastes. Because liability is joint and several, when the harm done is indivisible, one party can be held responsible for the full cost of the remedy even though that party may have disposed of only a portion of the hazardous substances at the site. Retroactive liability means that liability applies to actions that took place before CERCLA was passed.

EPA has had considerable success in recent years in enforcing the cleanup responsibilities of potentially responsible parties (PRP) under this system of liability. For example, PRPs undertook 72 percent of the new cleanups started in fiscal year 1992. The liability standards may also promote careful handling of hazardous wastes and encourage voluntary restoration of contaminated property. At the same time, allocating responsibility for cleanup costs under the joint and several liability standard can be difficult and expensive. Data on wastes disposed of years ago by the parties may be limited; disputes can arise about how the relative toxicity of wastes should affect responsibility for cleanup; and liability for wastes deposited by unknown contributors may have to be apportioned among known contributors. Negotiations take place both between EPA and the PRPs and among the PRPs. EPA encourages PRPs to organize committees at each site to address allocation issues. Individual PRPs and PRP committees hire counsel to represent them and technical consultants to support their negotiation or litigation positions. The costs associated with

negotiation and litigation are sometimes referred to as transaction costs.

Transaction costs at some sites are compounded by lawsuits brought by PRPs against other parties that the PRPs believe contributed to the contamination and should help to pay for the cleanup. These contribution suits can involve hundreds and, in some instances, over a thousand parties.[3] At some sites, defendants in contribution suits have included contributors of minuscule amounts of wastes--such as fast food restaurants, a Little League, and even a local Elks Club--that EPA as a matter of policy does not normally pursue for cleanup costs. The agency refers to these small contributors as de micromis parties.

Another tier of transaction costs--outside of the scope of our review and not directly addressed by the Superfund settlement tools--derives from disputes between PRPs and their insurers. As PRPs are notified of their potential liabilities, many seek coverage under their insurance policies. Insurers may refuse to pay these claims, and complicated litigation may follow.

To help parties reach settlements with EPA and with each other, the Superfund Amendments and Reauthorization Act of 1986 (SARA) gave EPA the authority to use tools to reduce transaction

[3]See app. II for a discussion of possible techniques for discouraging contribution suits by encouraging parties to settle with EPA.

costs, including de minimis settlements, NBARs, mixed funding, and ADR.

SETTLEMENT TOOLS HAVE BEEN USED INFREQUENTLY

Although almost 7 years have passed since SARA authorized settlement tools, EPA has used them at relatively few sites. Out of 1,074 Superfund nonfederal sites, as of September 1993, EPA had entered into de minimis settlements at only 73 sites, prepared NBARs at 5 sites, completed mixed-funding arrangements at 16 sites, and used ADR at 35 sites. Moreover, use of the tools tends to be concentrated in a few of EPA's 10 regional offices. (See table 1.) Two regions account for almost half of sites where the de minimis settlements have been used; seven regions have never issued an NBAR; two regions have done most of the ADR.

Table 1: Total Number of Sites Where Settlement Tools Were Used, by Region (as of September 1993)

Region	Total number of NPL sites per region[a]	Number of sites where tools were used			
		De minimis	NBARS	Mixed funding	ADR
I	77	14	3	2	10
II	188	7	0	2	2
III	143	4	0	4	1
IV	141	8	0	1	1
V	248	21	0	2	13
VI	63	6	0	2	0
VII	54	2	0	2	1
VIII	34	3	0	0	1
IX	78	2	1	0	3
X	48	6	1	1	2
Total	1,074	73	5	16	34[b]

[a]The number of sites is shown to provide some perspective on how frequently the tools have been used; however, not every site is a candidate for the use of every tool. The numbers exclude federally owned sites.

[b]EPA headquarters used ADR at one additional site.

Of the tools, de minimis settlements have been used the most often. EPA has reached 125 de minimis settlements at 73 Superfund sites. Fifty-eight percent of the settlements occurred in fiscal

years 1992 and 1993, when the agency made a special effort to increase its rate of de minimis settlements. A study prepared for the U.S. Administrative Conference found that de minimis settlements have been "greatly" underutilized. This study estimated that these settlements have been used at only 20 percent of the sites likely to benefit from them. Although EPA disagrees with some of the study's assumptions and it is clear that de minimis settlements are not appropriate for every site, EPA officials concur with the overall theme of the study--that EPA should enter into more de minimis settlements.

EPA's experience with de minimis settlements indicates that they are potentially powerful techniques for resolving the liability and reducing the transaction costs of large numbers of parties. The 125 settlements involve agreements with over 5,200 parties. In Region IX, one de minimis settlement in the pipeline has about 3,200 eligible de minimis parties.

The Congress intended that EPA offer de minimis settlements to parties with small liability shares as early as possible in the cleanup process. This has not generally happened. According to the Administrative Conference report, the de minimis settlement at most sites did not occur until EPA had formally estimated the cleanup costs and resolved the liability of the major parties. Much of the potential of the de minimis tool for reducing

transaction costs can be lost when small contributors are not removed from the settlement process early.

Use of NBARs and mixed funding has been very limited. EPA has prepared NBARs at five sites, one of which was part of a special pilot project. EPA has completed 16 mixed-funding agreements, including 12 preauthorized agreements and 4 mixed-work arrangements. However, two EPA enforcement practices have partially taken the place of NBARs and mixed funding. First, in about 172 instances, EPA has supplied PRPs with waste-in lists--lists showing EPA's data on the volume and type of wastes contributed by PRPs to a site. These lists can help PRPs resolve allocation issues but are not full substitutes for NBARs because they do not provide the government's opinion on cost allocation. In addition, EPA contributes to site cleanup costs, in effect providing mixed funding, whenever it settles with PRPs for less than full cleanup costs. Although the agency does not keep summary data on these compromises, regional officials told us that they occur in virtually every Superfund settlement.

EPA has used ADR in Superfund cases at 35 sites. Most of the ADR has been concentrated in two regions that have been receptive to the use of this tool. (See app. III for case studies on the settlement tools).

SEVERAL FACTORS ACCOUNT FOR THE LIMITED USE OF THE SETTLEMENT TOOLS

Why have the statutorily authorized settlement tools been used at so few sites? Although the reasons differ to some extent for each of the tools, there seems to be an overriding explanation: EPA has not managed the Superfund program to promote their use. For example, EPA has not fully surveyed sites to determine which might be candidates for the use of these tools or actively informed PRPs of their availability in all cases. It has not determined what resources the regions need to implement the settlement tools or how to reconcile goals for achieving large numbers of settlements with concern for responsible parties' transaction costs.

In addition, regional officials we interviewed thought that administrative requirements for using some of the settlement techniques unnecessarily limited the cases in which they could be applied.

EPA's limited use of the settlement tools is a chronic problem. In its 1989 management review, EPA identified a number of obstacles to wider use of the tools, including the belief, held by some agency officials, that the tools were inconsistent with the Superfund liability doctrine, that they were expensive to use, or that they diverted EPA resources from efforts to achieve cleanups.

The report stated that EPA may lack the control needed to ensure that regional decisions are consistent with national policy direction. The report recommended that EPA provide training for regional personnel, develop an incentive system for the regions to use these tools, and establish specific goals for regional use of the tools. These recommendations were never fully implemented.

In 1988 testimony before the House Energy and Commerce Committee's Subcommittee on Oversight and Investigations,[4] we indicated that EPA had not given high priority to de minimis settlements, had limited staff available for this function, and had not established goals for these settlements. In a 1989 report,[5] we discussed our survey of EPA regional staff to determine why de minimis and other settlement tools were not being used. Limited staff and funds and low priority were some of the reasons most often cited by regional project managers and attorneys for not using de minimis settlements as frequently as possible. Regional project managers and attorneys also cited limited staff training and experience.

In the past year, as controversy over Superfund transaction costs has grown, EPA has given greater emphasis to the use of the statutory settlement tools. The most significant achievement from

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[4]Superfund De Minimis Settlements (GAO/RCED T-88-46, June 20, 1988).

[5]Superfund: A More Vigorous and Better Managed Enforcement Program Is Needed (GAO/RCED-90-22, Dec. 14, 1989).

this effort so far has been an increase in the use of de minimis settlements and ADR techniques. Pilot studies were also begun to assess the potential for greater use of NBARs. However, the agency is still a long way from using the tools routinely.

EPA needs to sustain its current interest in the tools and address significant impediments that remain to its use of them. While improving and expanding the use of each tool depend on changes unique to that tool, EPA could nevertheless take some overall management actions to foster an agency culture that values the use of the tools. EPA could do more to publicize their availability, determine the maximum practical extent of their use, assess the resources that the regions need to use them, target resources specifically for their use, share success stories across regions, and provide incentives and accountability for their sustained use.

De Minimis Settlements

EPA's experience with the de minimis settlement tool illustrates the impediments that have restricted the use of the SARA tools.

EPA officials told us that the cost to the regions of de minimis settlements represents a major impediment to completing such settlements. They said that de minimis settlements compete

for limited enforcement resources and can distract already overburdened regional site teams from site cleanup. The timing of these settlements intensifies this problem because they may occur about the time the regional site teams are preparing for cleanup negotiations with the major parties.

The costs of some de minimis settlements can be large and represent a heavy burden on a region's resources. For example, in 1992, an early de minimis settlement involving 170 parties at a Region III site cost $723,000 in contract support and took 3,300 hours of EPA staff time. Despite such sizeable expenses, EPA does not routinely collect information on the costs of de minimis settlements or regularly provide special funding to the regions to facilitate them.

EPA officials also told us that certain de minimis policies have limited the number of settlements by making it difficult for minor contributors of hazardous waste to qualify for de minimis settlements. For example, until recently, EPA guidance required that before a de minimis settlement could be reached, a waste-in list--a ranking of the waste contributions of all the PRPs--had to be prepared. In effect, this policy permitted a de minimis settlement only when the waste contributions of all parties were known. A party that contributed a small quantity of waste at a site where the contributions of all other parties were not known would not be eligible for de minimis treatment.

EPA's former requirement for a waste-in list restricted the potential application of the de minimis tool. First, it limited the number of sites that could be candidates for such settlements; EPA estimates that data sufficient to prepare a waste-in list are not available at most sites. Second, because waste-in lists can be expensive to prepare, this requirement potentially increased the government's costs.

Inadequate EPA administrative guidance also limited the number of de minimis settlements, according to regional officials. SARA requires EPA to determine that the toxicity of the hazardous waste contributed by a prospective de minimis party is "minimal in comparison to other hazardous substances" deposited at a site. EPA officials believe that it was difficult to make defensible toxicity determinations under the general guidance the agency has published.

Moreover, the de minimis settlement tool did not fully protect contributors of minuscule amounts of waste, referred to as de micromis contributors, from contribution suits. In recent years, PRPs at some sites have threatened contribution suits against hundreds of such parties. Until recently, EPA did not have a policy to protect de micromis parties from contribution suits.

Recent Developments and Options for Further Action

Over the past few years, as complaints mounted that EPA was not making appropriate use of de minimis settlements, the agency took steps that appear to be increasing the use of this tool. EPA provided regions with resources, training, and guidance for de minimis settlements and supported innovative regional pilot efforts. The agency also made a small start at encouraging de minimis settlements earlier in the enforcement process, in accordance with SARA's intent. EPA has completed 10 early de minimis settlements. One pilot project is exploring the potential for completing a de minimis settlement even before the site is added to the National Priorities List (NPL).

Most recently, on July 30, 1993, EPA issued guidance that may simplify de minimis determinations and expand the use of these settlements. The guidance permits regions to make a de minimis determination without preparing a waste-in list or volumetric ranking. To determine whether a PRP is eligible for a de minimis settlement, a region need only assess the individual PRP's waste contribution relative to the volume of waste at a site. Regions may estimate the volume of waste present at the site by sampling contamination or by other methods. However, this guidance may not simplify toxicity determinations for de minimis settlements--it merely restates language from earlier guidance intended to provide a general standard for these determinations.

The July 30, 1993, guidance also identifies ways that regions can facilitate de minimis settlements. For example, they can settle with de minimis parties individually so that eligible parties will not incur transaction costs while waiting for a de minimis group to form. The guidance recommends that regions develop a strategy to inform PRPs of the benefits that may accrue from a de minimis settlement.

Also, on July 30, 1993, EPA issued guidance that would allow regions to resolve the liability of de micromis parties and provide them with contribution protection under expedited settlement procedures. How effective this guidance will be in removing de micromis parties from the Superfund process remains to be seen. If successful, the guidance will reduce the number of contribution actions taken against de micromis parties. If these parties continue to be sued, special statutory protection for de micromis parties may be needed.

Despite recent improvements, EPA has not fully addressed two key barriers to de minimis settlements. The agency has not developed a plan for funding an increased number of these settlements over the long term. Nor has the agency fully determined how many sites are potential candidates for de minimis settlements.

In the short term, EPA has instructed the regions to divert resources from other activities to achieve new de minimis goals, but it is unclear how the agency intends to fund greater use of de minimis settlements over the long term. The agency's current de minimis goals are based on historical use of the tool. In order to establish rational de minimis goals and determine future resource needs, EPA needs to conduct a comprehensive inventory of the NPL sites to identify de minimis candidates.

Targeting resources specifically for de minimis settlements could increase their use. For example, EPA has detailed headquarters attorneys to some regions to help them reach de minimis settlements. Building on this experience, regional officials recommended that EPA assemble region- or headquarters-based task forces (or "SWAT" teams) to assist with the de minimis settlements while the remedial project manager and site attorney work on other aspects of the site cleanup.

EPA could also expand its effort to encourage non-de minimis parties to provide resource assistance for de minimis settlements. At a Region IX site that has thousands of eligible de minimis parties, the PRP steering committee has agreed to help EPA develop data that the agency needs for the de minimis determination. This sharing of effort will reduce the demand on EPA's resources and foster settlement with the major parties because the moneys obtained from the de minimis settlement can be used toward cleanup.

Nonbinding Allocations of Responsibility

Some of the same problems that have limited the use of de minimis settlements have discouraged the use of NBARs. First, EPA has not assigned a high priority to, or promoted, the use of NBARs among PRP groups. For example, although EPA guidance requires that PRPs be informed early in the process about NBARs, none of the model early notice letters used in the three regions we visited mentioned NBARs. Second, preparing an NBAR, like preparing de minimis determinations, can divert the regional site team from site cleanup. And EPA has not provided additional resources specifically for developing NBARs. Finally, although there are other allocation methods, EPA guidance recommends that the NBAR be based primarily on volumetric data. However, an EPA official stated that volumetric data are available at only a minority of sites. Furthermore, some regional officials believe that an NBAR can be prepared only when volumetric data are available.

Recent Developments and Options for Further Action

EPA has not assigned a high priority to NBARs primarily because it believes that most PRPs prefer to do their own cost allocation rather than rely on EPA's. However, there is some evidence that PRPs may be more willing to accept NBARs than EPA has assumed. For example, a recent EPA pilot study demonstrated that PRPs might use NBARs more if EPA actively promoted them. In

addition, two national groups of PRPs we contacted believe that NBARS should be used more often to assist PRPs in reaching agreements on cost allocation.

EPA would be better informed about PRPs' interest in NBARs if it abided by its own guidance and notified PRPs at every site about the availability of this tool. The guidance also makes the use of NBARs contingent on EPA's receiving requests from a significant percentage of the PRPs at a site. At some sites, however, EPA may want to consider using an NBAR when negotiations have broken down. Finally, EPA guidance may be artificially restricting the use of NBARs because the agency bases its use of the tool, in part, on the availability of volumetric data, although other methods could be explored for allocating the percentage share of cleanup.

Mixed Funding

EPA has made limited use of formal mixed funding and has not promoted regional use of this tool. We agree that a cautious approach to the use of this tool is appropriate.

EPA regional staff are reluctant to use mixed funding. Although most regions have used preauthorized mixed funding, only two have done so more than once, and no applications are pending. The agency's reluctance to use mixed funding stems from concerns that this tool will compromise the Superfund program's joint and

several liability standard and EPA's ability to achieve settlements. Therefore, although EPA guidance does not prohibit the use of Superfund money in mixed-funding arrangements, EPA has not used this money to pay for "orphan shares" at sites. Orphan shares are costs associated with wastes deposited by unknown or nonviable parties. Many agency officials believe that this approach is consistent with the intent of the Superfund law. In addition, regional officials generally thought that they could facilitate settlement more efficiently through appropriate compromises with responsible parties--by, for example, waiving the right of the government to recoup all of its costs from the parties.

Regional officials also expressed concern that expanded use of mixed funding would increase transaction costs and be too expensive for the government. A regional official questioned whether greater use of mixed funding would expedite settlements or simply prolong negotiations by encouraging every PRP to seek mixed funding. Furthermore, if mixed funding were increasingly used at sites where there are no nonsettlors against whom to recover EPA's costs, federal costs would rise sharply. EPA estimates that paying for the orphan share of cleanup design and construction at sites where PRPs perform the cleanup would cost the Superfund up to $420 million annually, a sum almost equal to EPA's estimated fiscal year 1993 obligations for cleanup design and construction where EPA performed the cleanup.

Some regional officials thought that mixed funding had a limited role to play at sites where the only viable PRPs were minor contributors and where the major contributors were unknown or nonviable. But regional officials noted that even in such circumstances, when mixed funding may be warranted, cumbersome administrative procedures discourage its use. Because of these procedures, officials who had used preauthorized mixed funding were reluctant to do so again. A headquarters official acknowledged that the lengthy application, approval, and reimbursement process generates costs that reduce the apparent savings from an expedited settlement. EPA is addressing this problem by developing new guidance to streamline the application process.

Recent Developments and Options for Further Action

In the past year, EPA sponsored a study of mixed funding that identified goals--such as promoting the use of innovative technology and expediting cleanup--that might be furthered through the use of mixed funding and discussed several mechanisms for increasing the use of this tool without incurring excessive costs. EPA is considering whether any policy changes should be made as a result of this study and is developing mixed-funding pilot projects. We believe that a cautious approach to using mixed funding is appropriate, but we applaud EPA's effort to streamline preauthorization procedures and reassess the agency's use of this tool.

Alternative Dispute Resolution

EPA regions have been reluctant to use ADR techniques in Superfund cases. In 1987, EPA issued final guidance on the use of ADR in Superfund and other enforcement cases and expected each region to nominate at least one case during that fiscal year. Regional response to the initiative was slow. Before 1991, 3 of 10 regions had nominated Superfund cases, and only 2 regions had actually used ADR in Superfund settlement negotiations.

Many regional officials believe that ADR entails additional work and expense that primarily benefit PRPs. Several officials in one region we visited said that EPA should not sponsor ADR services if settlements can be achieved through traditional enforcement efforts. However, officials in regions that have used ADR techniques at several sites were enthusiastic about this tool's potential to reduce the government's transaction costs. They reported that ADR had made it possible to obtain settlements in cases that would otherwise not have been settled. In addition, Region V officials believe that the use of ADR eliminated costs usually incurred in preparing a case for referral to the Department of Justice and in protracted negotiations.

Recent Developments and Options for Further Action

Within the last 4 years, EPA has created a headquarters liaison position to coordinate ADR activities agencywide and designated ADR leaders in the regional offices, established dedicated funding for ADR activities, developed a reporting system to monitor the regions' use of the tool, provided regional training, and sponsored an ADR pilot project. These efforts to promote ADR have had some success. ADR techniques are currently being used at 15 sites, and 9 out of 10 regions have now had some experience with ADR.

EPA is moving in the right direction by taking steps to explore the possibilities for greater use of ADR. A recently announced pilot project will use ADR at about 20 sites, as well as NBARs, where appropriate. EPA's challenge is to move from pilot projects to the routine use of this tool in all EPA regions.

CONCLUSION

For most of the 7 years since the Congress provided EPA with tools to expedite Superfund settlements, the agency has done little to promote their use and has placed little emphasis on the need to reduce transaction costs. As a result, the full potential of the tools to reduce transaction costs is unknown.

Within the past year, and particularly within the past few months, EPA has paid more attention to controlling transaction costs. On June 23, 1993, EPA announced plans for overcoming many obstacles to greater use of the settlement tools discussed in this statement. For example, EPA required regions to identify candidates for de minimis settlements, issued new de minimis guidance that simplified these determinations, and issued de micromis guidance. The agency also announced a pilot project, involving about 20 sites, to explore the use of ADR and NBARs. In addition, EPA will sponsor pilot projects to reexamine the possible roles of mixed funding and will consider streamlining mixed-funding procedures.

EPA's actions are evidence of a new concern for controlling Superfund transaction costs by increasing the use of the settlement tools. Whether the initiatives produce lasting improvement will depend on how well EPA manages full implementation of the effort. Before EPA can make more effective use of these settlement tools, it needs to address management issues. It needs to work toward creating an enforcement attitude that is concerned with reducing the transaction costs of Superfund's responsible parties. Specific steps toward the development of this approach include assessing the potential applicability of these settlement tools, creating regional accountability for their use, targeting resources, reviewing administrative procedures, and making PRPs more aware that these tools are available.

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Mr. Chairman, that concludes my prepared statement. I will be glad to respond to any questions that you or Members of the Subcommittee may have.

SUPERFUND SETTLEMENT TOOLS

DE MINIMIS SETTLEMENTS

During the settlement process, potentially responsible parties (PRP) that contributed only a relatively small amount of low-toxicity waste to a site--known as de minimis parties--can incur substantial transaction costs, which may exceed their share of the cleanup costs. To provide relief, the Congress, in the Superfund Amendments and Reauthorization Act of 1986 (SARA), gave the Environmental Protection Agency (EPA) the authority to enter into expedited settlements with such parties.

De minimis settlors can be large or small companies, government entities, or individuals. At some sites, these contributors number in the hundreds or thousands.

De minimis settlements can reduce transaction costs for all parties when completed early because they end the involvement of de minimis parties and reduce the number of parties with which EPA and the major PRPs must negotiate. De minimis settlements also protect small contributors against claims by third-party PRPs for any further contributions toward cleanups. This relieves small contributors of transaction costs they might otherwise incur as defendants in contribution suits.

NONBINDING ALLOCATIONS OF RESPONSIBLITY

SARA also provides EPA with discretionary authority to issue nonbinding preliminary allocations of responsibility (NBAR). These are allocations by EPA to individual PRPs of a percentage of the total cleanup costs. NBARs are advisory--they are not binding on the government or PRPs--and "preliminary"--PRPs can make adjustments to them. According to EPA guidance, the agency can prepare an NBAR when it will promote a settlement and reduce transaction costs, especially when a significant percentage of the PRPs at a site request one. However, EPA generally leaves PRPs to work cut among themselves how much each will pay toward settlement at a site.

MIXED FUNDING

SARA also authorizes EPA to share cleanup costs with PRPs through mixed-funding agreements. There are three types of these agreements: "preauthorized" mixed-funding agreements, under which PRPs perform the cleanup and EPA reimburses a portion of their costs; mixed-work agreements, under which EPA performs a discrete portion of the cleanup and PRPs perform the rest; and "cashout" mixed-funding agreements, under which EPA accepts a cash payment and agrees to perform the cleanup. Of these three arrangements, the agency prefers preauthorization because it requires the PRP,

and not EPA, to perform the cleanup. In addition to these formal mixed-funding agreements, informal or "surrogate" mixed funding occurs at sites whenever EPA agrees to settle for less than 100 percent of the costs that it might be able to recover from settling parties.

ALTERNATIVE DISPUTE RESOLUTION

The Superfund law also authorizes EPA to use alternative dispute resolution (ADR), which involves a neutral third party to aid in the resolution of disputes without litigation. SARA provides that EPA may enter into arbitration for cost recovery claims, provided that the claims do not exceed $500,000. EPA has broader authority to use other ADR techniques--such as mediation, minitrials, and fact-finding--to resolve other disputes under the Administrative Dispute Resolution Act (P.L. 101-552) and the Executive Order on Civil Justice Reform (E.O. 12778). The executive order mandates that attorneys representing the government use ADR techniques to expedite the prompt and proper settlement of federal disputes.

OTHER STRATEGIES FOR REDUCING TRANSACTION COSTS

In addition to the tools created by the Superfund Amendments and Reauthorization Act of 1986, EPA has other means of reducing transaction costs, including strategies for reducing costs that arise when recalcitrant PRPs refuse to settle. "Recalcitrant" PRPs share responsibility for the cleanup but refuse to negotiate and settle their share of the costs.

Recalcitrant PRPs increase transaction costs for settling PRPs and the government. Settling PRPs incur the costs of negotiating and allocating among themselves the recalcitrant PRPs' shares of the cleanup costs. They may also incur the expense of suing recalcitrant PRPs for their shares of the costs. EPA's costs also increase when the agency is involved in protracted negotiations or is forced to take enforcement action against recalcitrant PRPs. The EPA regions we visited employ a number of strategies intended to decrease transaction costs by discouraging recalcitrance. In addition, certain court jurisdictions and states have adopted civil penalties for recalcitrance.

EPA Enforcement Practices to Discourage Recalcitrance

EPA regions have developed a variety of enforcement practices to discourage recalcitrance and thereby reduce transaction costs. These strategies penalize PRPs that refuse to settle and reward those that do settle. Some regions carve out a disproportionately large share of the cleanup costs for recalcitrant PRPs, rewarding the settlors with a smaller share.

In addition, some EPA regions penalize PRPs that are slow to settle by graduating the premiums that the agency charges on certain settlements. Graduated premiums, or "delay damages," are used when EPA accepts a cash payment in settlement instead of requiring the PRPs to perform the cleanup. Settlors that do not participate in the cleanup pay a premium--over and above their share of the cleanup costs--to cover unanticipated future costs. Regions that use graduated premiums require each successive round of settlors to pay a higher premium. For example, in one case, EPA charged the first group of settlors a premium that was 160 percent of the group's cleanup costs. It charged the second group a 260-percent premium. The remaining PRPs were required to pay a 900-percent premium. PRPs that settled early were thus rewarded for their cooperation.

APPENDIX II APPENDIX II

Proposed Legal Strategies for Reducing Recalcitrance

Penalties for recalcitrance have also been imposed by state law and the courts. Some parties or groups have recommended that these and other penalties be authorized or required by the Superfund law. The various penalties would compensate PRPs that incur litigation expenses in order to pursue recalcitrant PRPs for their fair share of cleanup costs. By creating more severe consequences for being found liable in a contribution action, these penalties would also discourage recalcitrance.

Potentially recalcitrant PRPs would be more likely to participate in negotiations, according to some PRP attorneys, if they were obligated, upon being found liable in a contribution action, to pay the plaintiff's legal fees. One court has, in fact, allowed a plaintiff in a contribution suit to recover attorney fees. However, attorney fees are not consistently awarded--two other courts have declined to award attorney fees.[1] Some argue that awarding attorney fees would reduce recalcitrance if it were applied consistently in contribution actions. However, to ensure

[1]In General Electric Co. v. Litton Industrial Automation Systems, Inc., 920 F.2d 1415 (8th Cir. 1990) recovery of legal fees was allowed. In Key Tronic Corp. v. the United States of America, 984 F.2d 1025 (9th Cir. 1993) and Stanton Road Associates v. Lohrey Enterprises, 984 F.2d 1015 (9th Cir. 1993) recovery of legal fees was denied.

that every recalcitrant PRP risked incurring this cost, CERCLA would have to explicitly permit successful contribution plaintiffs to recover legal fees.

A paper published by Clean Sites, a nonprofit organization working to facilitate the cleanup of hazardous waste sites, advocates permitting successful contribution plaintiffs to recover up to 10 percent in excess of the defendant's fair share of the cleanup costs. For example, if a court found that a defendant's share of the cleanup costs amounted to $150,000, the plaintiff could collect up to $165,000. A statutory amendment to CERCLA would also be necessary to create this penalty.

The Clean Sites paper also discusses the potential use of civil penalties modeled after ones recently created by New Jersey and California. These states have enacted laws allowing parties that clean up state hazardous waste sites to collect treble damages from recalcitrant parties. The states retain a portion of the collected damages. To obtain damages, a party must clean up the site and then successfully sue a party that violated a state order to perform the cleanup. In addition, New Jersey requires the party to obtain state approval to seek treble damages. These laws were enacted primarily to create incentives for private parties to clean up hazardous waste sites voluntarily. Anyone--whether responsible

or not for contaminating a site--can clean up the site and seek treble damages.

Officials in both states believe this penalty for losing a contribution action will also discourage recalcitrance, but it is too early to fully evaluate the impact of these laws. The New Jersey law was enacted in December 1990, and the California law went into effect in January 1993. As of August 1993, New Jersey had approved one request for damages, and in approximately five other cases the state had sent a letter to the recalcitrant parties warning that treble damages would be authorized if the parties failed to settle within a certain number of days. According to a New Jersey official, the recalcitrant parties agreed in two cases to participate in the cleanup after being threatened with treble damages.

Creating new civil penalties for PRPs that lose contribution actions in Superfund cases might discourage recalcitrance. However, such penalties might also increase transaction costs, at least in the short term, or unfairly penalize PRPs that are not recalcitrant. Some EPA officials and a PRP attorney we spoke to are concerned that allowing contribution plaintiffs to obtain damages might encourage contribution actions and spawn more Superfund litigation. Advocates of civil penalties counter that, in the long term, the penalties would encourage potentially

recalcitrant PRPs to enter into cleanup negotiations with other PRPs, thereby reducing the number of contribution suits.

Some PRP attorneys are concerned, however, that increasing the penalties for being found liable in a contribution action might inadvertently reduce the fairness of the Superfund program. If threatened with damages--particularly treble damages--defendants in contribution suits might feel pressured to settle with the plaintiffs even if they had legitimate grounds to contest their liability.

The experiences of New Jersey and California may provide useful information on the effect of penalties for recalcitrance. If civil penalties discourage recalcitrance without increasing litigation or unfairly punishing nonrecalcitrant parties, it might be appropriate to consider civil penalties as a means to encourage participation in Superfund settlement negotiations.

SETTLEMENT TOOL CASE STUDIES

The following exemplify EPA's recent use of the settlements tools.

DE MINIMIS SETTLEMENT:
TONOLLI SITE

At the Tonolli site in Nesquehoning, Pennsylvania, EPA Region III used its de minimis authority to resolve the liability of small contributors of hazardous waste and to reduce their transaction costs. Typically, Region III waits for de minimis parties to propose that EPA offer a de minimis settlement. In this instance, EPA selected Tonolli as a pilot project to assess the potential for itself initiating de minimis offers. EPA offered eligible PRPs an "early" de minimis settlement, allowing them to settle before the agency completed its final estimate of the cleanup costs. PRPs that accepted this offer avoided the transaction costs they would have incurred while awaiting the final estimate of cleanup costs and then participating in settlement negotiations.

Background

Tonolli is a 20-acre site where batteries were stripped for their lead content until 1985. Arsenic, cadmium, lead, and

chromium from the former battery recycling facility have contaminated the site. EPA's final cleanup estimate was $17 million. EPA identified about 400 PRPs as eligible for a de minimis settlement--that is, EPA considered them to be small contributors because they had contributed less than 1 percent of the hazardous waste at the site--and named 19 PRPs as "major" contributors.

De Minimis Offer

Departing from its practice of waiting for PRPs to propose a de minimis settlement, Region III notified PRPs of their eligibility and invited them to a general meeting at which regional officials explained the de minimis process. Many small contributors that attended the meeting were unfamiliar with the Superfund program and de minimis settlements. In June 1992, EPA offered a de minimis settlement to about 400 PRPs.

Two rounds of de minimis settlements took place. In the first round, 170 de minimis PRPs agreed to pay their share of the cleanup costs plus a 65-percent premium for unanticipated future cleanup costs, for a total of $3.5 million. EPA allowed some settlors to pay in installments. Subsequently, some of the remaining eligible PRPs asked for a second opportunity to settle because they had not clearly understood the de minimis process. EPA made a second

offer, attaching a 10-percent premium over the terms of the first settlement as a disincentive for future settlors to delay. In this round, thirty-three PRPs settled for $542,000.

Results

According to regional officials and a PRP representative, the Tonolli pilot project reduced transaction costs. According to regional officials, 203 PRPs accepted a de minimis settlement--and most of these PRPs settled early--lowering their transactions costs from what these costs would have been if the PRPs had been compelled to participate in negotiations with the major parties or had been involved with third-party litigation because they had not settled. An attorney representing the de minimis parties stated that they had avoided significant transaction costs that they would have incurred if they had become defendants in a third-party contribution action. According to the PRP representative, EPA's settlement offer brought a larger number of PRPs into the settlement process than expected.

EPA obtained settlement agreements of over $4 million toward cleanup. With fewer parties, EPA believes it will be able to manage negotiations more efficiently with the major PRPs--thereby avoiding enforcement costs. Region III plans to initiate de minimis settlements at other sites.

According to regional officials, the settlement was resource intensive. The region estimates that it took 3,300 hours in staff time for these de minimis settlements and $720,000 in contractor support for preparing a waste-in list and performing administrative tasks. Region III believes that the de minimis settlement delayed cleanup at this site and other sites in the region because it diverted the site team.

NONBINDING ALLOCATION OF RESPONSIBILITY: HASSAYAMPA LANDFILL SITE

At the Hassayampa site, near Phoenix, Arizona, EPA Region IX assisted PRPs in their allocation negotiations by providing an NBAR--a nonbinding allocation of percentage shares of the cleanup costs among the PRPs at the site. Region IX, like other regions we visited, does not routinely notify PRPs of the availability of an NBAR. But, spurred by a headquarters pilot project to explore expanding the use of the NBAR tool, Region IX offered an NBAR at Hassayampa. According to a PRP representative, the PRPs based their allocation on the NBAR, which facilitated their allocation decisions and reduced their transaction costs.

Background

The Hassayampa Landfill site, located in Maricopa County 40 miles west of Phoenix, has operated as a municipal landfill since 1961. In addition to municipal wastes, the landfill accepted hazardous industrial wastes between April 1979 and October 1982. Site contaminants include volatile organic compounds, heavy metals, pesticides, and lime wastes. EPA's estimate of the cleanup costs was $6.1 million. The NBAR identified 138 PRPs.

NBAR Issued

Region IX notified the PRPs that EPA would offer an NBAR. According to a PRP representative, the PRPs were initially skeptical about the prospect of using an NBAR. But EPA worked with the PRPs and incorporated elements of the PRPs' existing allocation efforts in developing the NBAR.

PRPs at Hassayampa may have been receptive to EPA's allocation assistance because allocation disputes had taken place among the PRPs before cleanup negotiations began. PRPs that had studied treatment options at the site under EPA's direction and had reimbursed EPA for oversight costs had filed a contribution action against other PRPs. By the time negotiations for cleanup began,

the PRP community had engaged in a legal dispute and had incurred significant transaction costs, according to a PRP representative.

EPA issued the NBAR on September 28, 1992, and revised it on May 21, 1993. The PRPs agreed to use EPA's NBAR as the basis for allocating percentage shares. As of September 1993, a final settlement had not been signed, but EPA anticipates final settlement soon.

Results

A PRP representative told us that the NBAR facilitated PRP allocation decisions at Hassayampa and reduced PRP transaction costs. The representative stated that the NBAR had reduced the potential for protracted PRP negotiations because the PRPs accepted the government's allocation advice as credible. He characterized the savings in transaction costs as marginal in comparison with the transaction costs already incurred as a result of the contribution suit at the site. Nevertheless, the representative believed that the NBAR had improved cooperation among the PRPs over final cleanup negotiations and had reduced transaction costs.

A regional official also told us that the NBAR had facilitated PRP allocation. But he noted that the NBAR was resource intensive. The site team was heavily involved in the developing the NBAR. For

example, the regional site team had to conduct a time-consuming document review to respond to the relatively few questions raised about the draft allocation. EPA has not yet calculated the cost of preparing the NBAR. The cost of preparing the NBAR will ultimately be borne by the PRPs as part of the settlement.

ALTERNATIVE DISPUTE RESOLUTION:
SULLIVAN'S LEDGE SITE

EPA officials who have used ADR are generally enthusiastic about using these techniques, particularly in cases that might otherwise not be settled. A region I official said that using mediation during negotiations at the Sullivan's Ledge site in New Bedford, Massachusetts, saved the case attorney a substantial amount of time, allowed the agency to authorize the use of a less expensive remedy, and laid the groundwork for a good working relationship among parties that would have to cooperate for decades.

Background

Sullivan's Ledge is a 12-acre site in a residential area of New Bedford, Massachusetts, which was operated as a quarry until about 1932. After 1935, the city of New Bedford permitted the pits to be used for the disposal of hazardous materials and other

wastes. Air and groundwater on and around the site are contaminated with volatile organic compounds, inorganic compounds, polycyclic aromatic hydrocarbons, and polychlorinated biphenyls.

The site consists of two sections, called "operable units." In 1992, when the case was nominated for mediation, 14 PRPs had already agreed to clean up the first operable unit, and EPA was seeking a commitment to clean up the second.

Use of ADR Techniques

Region I nominated the site for mediation because the case involved complex issues affecting numerous private parties and a municipality. EPA regional staff hoped that mediation would allow them to avoid resource-intensive litigation.

Several factors made the site particularly appropriate for the use of ADR. The city of New Bedford, which owned and operated the site, was among the PRPs that refused to participate in the first settlement. The presence of municipal PRPs at a site may complicate negotiations because municipalities often have limited cash resources to contribute toward the cost of cleanups and may be unfamiliar with Superfund's liability provisions.

In addition, the projected cost of cleaning up the second operable unit depended on coordinating the remedial tasks at this unit with the work being carried out at the first operable unit. If the PRPs from the two operable units could agree to coordinate their work, they stood to reduce their remedial costs at the second operable unit by $5 million, and EPA stood to lower its oversight and enforcement costs.

A mediator brought together the parties from both operable units, helped them fashion settlement offers, and eventually helped identify tasks the city could perform in lieu of cash payments. The total cost of using mediation during formal negotiations was approximately $30,000, half of which EPA paid.

Results

Two PRPs, including the city of New Bedford, agreed to clean up the second operable unit. The PRPs from both operable units agreed to coordinate their tasks, allowing EPA to authorize the use of a remedy at the second operable unit that was expected to cost $2.8 rather than $7.8 million. EPA is currently suing the other two PRPs for their liability at the site.

The parties that participated in the mediation were pleased with the results. EPA officials said that mediation kept the

parties negotiating at several decision points when they would otherwise have pursued litigation and helped ensure that negotiations remained on schedule. In addition, regional officials said that the mediator took over difficult, time-consuming communications with PRPs, giving the officials more time for other case management activities. Finally, regional officials felt that mediation had laid the groundwork for good relationships among parties that would have to work together for decades to clean up the site.

According to EPA officials, PRPs from the first operable unit reported that mediation brought them to the negotiating table when they would otherwise not have come and kept them participating. In addition, the PRPs reportedly viewed EPA's participation in mediation as a sign of the agency's good faith.

PRPs from the second operable unit had similarly favorable views of the mediation process. A New Bedford official said that using a mediator made negotiations much more efficient, helped ensure that the municipality was treated fairly, and provided expertise that the city would otherwise have had to obtain from expensive Superfund attorneys and consultants. He added that he would not hesitate to use ADR again. A PRP attorney said that the mediator helped to structure the settlement and negotiate realistic schedules with EPA.

MIXED FUNDING:
HARVEY & KNOTT DRUM SITE

The perception that Superfund liability is unfair may discourage PRPs from settling, particularly when one PRP is asked to pay for an entire site because other financially viable PRPs have not settled. In such an event, settlement negotiations may be protracted or unproductive, increasing transaction costs for all the parties. At the Harvey & Knott Drum site in Delaware, Region III used mixed funding to expedite cleanup and make the settlement process more equitable.

Background

The Harvey & Knott Drum site is a 2-acre parcel of land in New Castle County, Delaware. The site, which was used as an open dump and burning ground, is contaminated with polychlorinated biphenyls, volatile organic compounds, and heavy metals. In addition to the owner and operator, two major PRPs sent waste to the site--General Motors (GM) and Chrysler Corporation.

Results

EPA used mixed funding to obtain a commitment from GM to clean up the site. GM was willing to undertake the cleanup but refused

to pay for the entire site when Chrysler--a financially viable PRP--refused to join in the settlement discussions. Chrysler denied that the wastes it had contributed to the site were hazardous. To persuade GM to clean up the site, EPA promised to reimburse GM for one-third of its cleanup costs, or $3,086,000.

EPA is attempting to recover these and other costs from PRPs that have not settled. The Department of Justice has filed a cost recovery action against Chrysler and the owner of the site, seeking the reimbursement promised to GM, as well as one-third of the costs that EPA will incur in overseeing activities at the site.

(160245)

Mr. SYNAR. Ms. Probst.

STATEMENT OF KATHERINE N. PROBST, FELLOW, CENTER FOR RISK MANAGEMENT, RESOURCES FOR THE FUTURE

Ms. PROBST. Chairman Synar, distinguished members of the subcommittee, thank you for inviting me.

My name is Katherine N. Probst, and I am a research fellow in the center for risk management at Resources for the Future [RFF].

Much of what I have to say today is based on research produced by my colleague, Paul Portney, and published in our report, "Assigning Liability for Superfund Cleanups: An Analysis of Policy Options." I would like to share with you our conclusions regarding the pros and cons of the current liability system and some alternative approaches. I would be happy to provide the members of this subcommittee with copies of the report.

Superfund liability standards have been criticized because, critics say, the liability scheme is unfair, slows cleanup, and results in unnecessary transaction costs. At the same time, the liability system is credited with bringing potential responsible parties to the table, with encouraging the cleanup of sites not on the national priorities list [NPL], and with encouraging those who handle hazardous substances to take greater care to avoid future liability.

In addition, while some may decry the liability scheme as a fundraising tool, EPA has successfully used its enforcement powers to get responsible parties to pay for site studies and cleanup. Of course, in addition to the pros and cons of alternative liability schemes, Congress has to be concerned with the financial implications of shifting cleanup responsibility from PRPs to the trust fund.

Barring a change in the law's cleanup standards or the overall pace of the program, any relaxation in liability will require a corollary increase in the trust fund and thus an increase in one or more of the current Superfund taxes or the creation of a new revenue source.

In our report we evaluated five liability approaches: The current program, expanded mixed funding for orphan shares, liability release for all closed codisposal landfills, liability release for all pre-1981 sites, and liability release for all sites on the current NPL. Some of these options are identical to those being discussed today.

Each of the liability approaches we examined was evaluated against six criteria: Speed of cleanup, transactions costs, effect on cleanup of sites not on the NPL, incentive for careful management of hazardous substances, fairness, and financially the implications for the trust fund. I would like to briefly summarize some of our conclusions.

The site cleanup process could be expedited by changing Superfund's liability standards but it could also be expedited under the current system. Are cleanups at NPL sites unbelievably slow? Yes. Is the major reason the current liability scheme? Probably not. Certainly some cleanup delay results from the need to negotiate with PRPs to get them to agree to conduct site studies and cleanups thus releasing these PRPs from liability would reduce those delays.

Just as clearly, however, the remedial process could be accelerated under the existing liability standards. There is ample evidence

to suggest that the cleanup process is plagued by a time consuming and bureaucratic site study process and the lack of clear cleanup standards.

The pace of cleanups being conducted by Federal agencies such as the Departments of Defense and Energy does not warrant tremendous optimism that a public works approach will lead to speedy and cost effective cleanups. While it is almost certain that changing the liability standards would speed cleanup, it is less clear whether this is the most promising way to accelerate cleanups of NPL sites.

Current sources of transactions costs could be reduced through modification of liability. But most liability alternatives will result in new transactions costs. Are there large transaction costs at some sites? Certainly. You have heard today about multiparty sites with 400 parties and those sites certainly have large costs.

Are there these kinds of transaction costs at all sites? Probably not. The bottom line is that the current liability standards are probably extremely effective in creating an incentive to clean up sites with few parties, such as chemical plants, wood preserving sites, and these sorts of facilities, and much less effective for multiparty sites.

Each of the alternative liability approaches we evaluated has the potential to reduce some transactions costs. Proposals to have the trust fund pay for orphan shares has the potential to reduce transactions costs between EPA and PRPs and among PRPs. But it would also increase the government's transactions costs. This proposal would also do little to reduce insurance coverage litigation.

Other more radical proposals, such as the treasury proposal or the national environmental trust fund, which would release PRPs of liability at whole categories of sites would certainly eliminate all current litigation-related transactions costs.

The greatest new transactions costs with these Public Works approaches, however, would be the inefficiency of having the government take the lead for site cleanups. If there is one element of Superfund on which almost everyone agrees, it is that the private sector can more cost effectively manage site cleanups than the Federal Government.

It is hard to imagine that putting the EPA in the driver's seat to implement cleanups would do anything other than lead to delays and higher administrative costs as the Agency has no choice but to comply with government contracting rules and regulations.

It is an open question whether total transaction costs would really be reduced under many of the alternative approaches being discussed. It may well be that we would simply be trading one source of transactions costs—litigation—for another: Government red tape.

Any of the modifications to the present standards will create at least some new inequities even as they ameliorate others. There is probably no fair Superfund financing scheme, either in terms of liability or in terms of taxes to finance the trust fund.

To the extent that some of those responsible for contamination are bankrupt or not financially viable, there really is no way to apportion these costs fairly. Perhaps the fairest system would be to use general revenues to finance these cleanups, not a likely option in today's economy.

Each of the liability schemes evaluated introduces a new element of unfairness. Eliminating liability for codisposal facilities in order to reduce transactions costs would be unfair to those who manage waste onsite and would remain liable. If the retroactive liability is eliminated for all pre-1981 sites—the trust fund would pay for cleanup at single party, industrial facilities where it seems obvious that the owner-operator of the facility is the most appropriate one to pay. There are tradeoffs among different liability schemes, but which is better depends on large part on the goals of the program who pays for the increased trust fund.

Finally, I would like to talk about the financial implications to the trust fund.

Mr. SYNAR. If you could begin to summarize.

Ms. PROBST. When we talk about different liability options, the financial implications range from about $325 million per year to about $3.7 billion a year.

All estimates of the implications to the trust fund depend on a couple of key assumptions. And it is very important to articulate those assumptions in order to figure out what the costs would be, because whether costs are spread over 5 years or 10 years, or the average site cost of cleanup is $25 million or $50 million, really makes a tremendous difference.

Thank you very much.

Mr. SYNAR. Thank you.

[NOTE.—A report from Resources for the Future entitled, "Assigning Liability for Superfund Cleanups: An Analysis of Policy Options," is on file in the subcommittee office.]

[The prepared statement of Ms. Probst follows:]

Written Statement of

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submitted to the

Environment, Energy and Natural Resources Subcommittee

Committee on Government Operations
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*The views expressed herein are those of the author only. Resources for the Future takes no official positions as an organization.

Chairman Synar and distinguished Members of the Subcommittee, thank you for inviting me to testify before you today. My name is Katherine N. Probst and I am a research fellow in the Center for Risk Management at Resources for the Future (RFF). RFF is an independent, non-profit research and educational organization located here in Washington, D.C. For 40 years, RFF has been conducting research on a wide variety of issues related to energy, natural resources and the environment. RFF does not lobby, and does not take positions on legislation as an organization. I am here today not as a representative of RFF, but to express my own views on Superfund, based on the Superfund research I have conducted over the past six years.

The Subcommittee has requested testimony today regarding the strengths and weaknesses of the current Superfund liability scheme, as well as the pros and cons of alternative liability schemes being proposed. Much of what I have to say today is based on research conducted with my colleague, Paul Portney, RFF Vice President and Senior Fellow, and published in our report *Assigning Liability for Superfund Cleanups: An Analysis of Policy Options*. In this report, we examined the strengths and weaknesses of the current Superfund liability scheme and four alternative approaches to it. I would like to share with you our conclusions regarding the pros and cons of the current liability system and some alternative approaches, as well as our estimates of the potential increases in trust fund revenues that would be required if the alternative approaches we examined were enacted in legislation. I would be happy to provide the members of this subcommittee with copies of the report, if that would be helpful.

After completing our analysis of the pros and cons of alternative Superfund liability approaches, we embarked on a follow-up research project to evaluate the economic implications of the current Superfund financing scheme and alternative

liability approaches and tax mechanisms. This research is being conducted with my colleagues Robert Litan, now at the U.S. Department of Justice (on leave from the Brookings Institution, which co-sponsored this research) and Don Fullerton of Carnegie Mellon University. While this research is not yet complete -- we hope to publish our work this spring -- some of my remarks today are based on this on-going research as well.

While my testimony today is based on research conducted with Dr. Portney and others, the views expressed are mine alone, and do not necessarily represent those of Dr. Portney nor of Resources for the Future.

My written testimony addresses two key issues relating to Superfund liability:

1. The pros and cons of the current liability approach and some of the alternative liability schemes being proposed;
2. The financial implications to the trust fund of some of the alternative liability approaches being discussed.

The final section of my written statement includes a brief description of Superfund-related research being conducted by researchers at Resources for the Future.

1. Pros and Cons of Alternative Superfund Liability Schemes

Superfund's liability standards have been criticized because, critics say, the liability scheme is unfair, slows cleanup and results in unnecessary transaction costs. At the same time, the liability system is credited with "bringing potentially responsible parties (PRPs) to the table," with encouraging the cleanup of sites not on the National

Priorities List (NPL), and with encouraging those who handle hazardous substances to take greater care to avoid future liability. In addition, while some may decry the liability scheme as a fundraising tool, EPA has successfully used its enforcement powers to get responsible parties to pay for site studies and cleanup. Of course, in addition to the pros and cons of alternative liability schemes, Congress has to be concerned with the financial implications of shifting cleanup responsibility from potentially responsible parties (PRPs) to the trust fund. For, barring a change in the law's cleanup standards or the overall pace of the program, any relaxation in liability will require a corollary increase in the trust fund and thus an increase in one or more of the current Superfund taxes, or the creation of a new revenue source.

As noted earlier, over a year ago my colleague, RFF Vice President Paul Portney, and I wrote a report evaluating the strengths and weaknesses of the current Superfund liability scheme and four alternative approaches.[1] We evaluated each alternative liability approach against six criteria: speed of cleanup, transactions costs, effect on cleanups of sites not on the NPL, incentive for careful management of hazardous substances, fairness, and, finally, financial implications for the size of the trust fund.[2]

The five liability approaches we examined were:

Option 1. Status Quo (The Current Superfund Program). Potentially responsible parties (PRPs) include the past and present owners and/or operators of a site, those who arranged for the transportation of hazardous substances to the site, and those who arranged for the treatment or disposal of the substances. These PRPs are subject to retroactive, strict, and joint and several liability. Under the current law, the trust fund generates approximately $1.7 billion annually. The trust fund is financed by petroleum excise taxes, a chemical feedstock tax, a corporate environmental tax, general revenues, and other sources. These funds are used by EPA to conduct site studies and cleanups itself and to finance the overall Superfund program, which involves settlement

[1] *Assigning Liability for Superfund Cleanups: An Analysis of Policy Options*, June 1992. referred to as "RFF Liability report."
[2] See Appendix A, for summary chart of our evaluation of each option.

negotiations and enforcement actions to get PRPs to pay for site activities, as well as other aspects of the Superfund program.

Option 2. Expanded Mixed Funding for Orphan Shares. Under this option, the trust fund would be increased to cover the shares of insolvent and recalcitrant parties at all current and future NPL sites. The liability standards in Superfund would remain unchanged, but, as a matter of policy, EPA would use trust fund monies to cover orphan shares. That is, the trust fund would pay for the shares of insolvent and recalcitrant parties and would use the law's powerful enforcement tools to seek to recover costs from recalcitrant parties. For the purposes of evaluating the financial implications of this option, we assumed that just under 75 percent of current NPL sites are multi-party sites with orphan shares and that the orphan share at a site averages 10 percent of total costs. Recent EPA data suggest that our original estimate may have underestimated the size of the orphan share, which the Agency estimates at 25 percent at PRP-lead sites. We did not estimate the financial implications to the trust fund of future NPL sites.

Option 3. Liability Release for All Closed Co-disposal Sites. Under this approach, any sites that accepted both municipal solid waste and industrial waste and that were closed at the time Superfund is amended would be cleaned up by EPA using trust fund monies. Thus, this option would apply to both current and future NPL sites. All PRPs at these sites would be released from Superfund liability. Based on our analysis of existing data, we assumed that there are approximately 250 such sites on the current NPL. Recent RFF analysis of NPL sites suggest that this an accurate estimate of the number of these sites on the NPL. While some future NPL sites will probably meet the criteria established above for a liability release, we did not estimate the financial implications for these future NPL sites to the trust fund.

Option 4. Liability Release for All Pre-1981 Sites. All PRPs at all sites where the waste disposal operation closed before January 1, 1981, would be released from Superfund liability under this option. Using monies from an augmented trust fund, EPA would be responsible for cleaning up these sites. This release would apply to sites that meet this criterion that are added to the NPL in the future. In our 1991 report, we estimated that there are 580 sites on the current NPL that meet this criterion. Again, additional sites would likely fall into this category as more sites are added to the NPL.

Option 5. Liability Release for Current NPL Sites. Under Option 5, all PRPs at all sites on the NPL on the date Superfund is reauthorized would be released from responsibility for cleanup of these sites. EPA would take over the responsibility and pay for cleanup at these sites using an expanded trust fund. This release from liability would apply only to sites on the NPL when the statute is amended; it would <u>not</u> apply to any sites added to the NPL after the statute is amended.

Some of the options we examined are almost identical to those being discussed today. For example, our Option 2 -- aggressive mixed funding -- is almost identical to proposals for the trust fund to pick up the costs of those PRPs who are considered "orphans." (The question of how an "orphan share" would be defined under this kind of approach is crucial to understanding the implications both on the trust fund and on new transaction costs likely to be created.) Our option 4, which would release PRPs at pre-1981 sites from liability is similar, although not identical to a proposal drafted by staff at the Treasury Department, in that PRPs retroactive liability would be eliminated. A variation on this option is the National Environmental Trust Fund (NETF) proposal, which uses a later cut-off date of 1987, thus leading to an increase in the amount of additional trust fund revenues needed to finance this alternative.

Our analysis of the five policy options identified strengths and weaknesses of each. Based on this analysis, we reached a number of general conclusions.

The site cleanup process could be expedited by changing Superfund's liability standards, but it could also be expedited under the current system.

Some cleanup delay results from the need to negotiate with PRPs to get them to agree to conduct site studies and cleanup. Releasing PRPs from some or all liability at some number of NPL sites (as in Options 2 through 5) should reduce these delays. Just as clearly, however, the remedial process could be accelerated under the existing liability standards, as EPA has recently proposed in its Superfund Accelerated Cleanup Model (SACM). Thus, while it is almost certain that changing the liability standards would speed cleanup, it is less clear whether that is the most promising way to accelerate the cleanup of sites on the National Priorities List.

Evaluation of the pace of cleanup conducted by federal agencies, such as the

Departments of Defense and Energy, do not warrant a tremendous optimism that a public works approach will lead to speedy and cost-effective cleanups.

Transactions costs could be reduced through modification of Superfund liability.

Ideally we would be able to calculate total transaction costs at each NPL site and estimate how any change in liability would affect site-specific and total transaction costs. Unfortunately, these data are unavailable. While research conducted by RAND is extremely helpful, their research covers an extremely small universe of sites, and we have no way of judging the representativeness of these sites, nor of the PRPs who participated in their research (many PRPs did not participate). Perhaps most importantly, the RAND research, of necessity, reports transaction costs to date. Most agree that transaction costs are "front-loaded," that is, that the ultimate percentage of transaction costs will decline one cleanup costs are actually incurred.

Those seeking ways to reduce transaction costs must bear in mind at least three different sources of these costs:

* Transaction costs that result from direct liability under Superfund (transaction costs resulting from government negotiation with and litigation against PRPs, as well as intra-PRP negotiations and litigation);

* Transaction costs that result because of negotiations and litigation regarding insurance coverage, that is involve disputes between PRPs and their insurers; and,

* Inefficiencies that result from the day-to-day management of site studies and cleanup activities.

Eliminating the need for EPA to reach agreement on cleanups with PRPs by releasing them from liability (under Options 3 through 5) would reduce transactions costs between EPA and PRPs and among PRPs. Some liability approaches, such as Option 2, have the potential to reduce transactions costs resulting from litigation between EPA and PRPs, and among PRPs, but would do little to reduce insurance coverage litigation. Options 3 through 5, however, would release all PRPs from liability at certain sites, and thus might eliminate all current litigation-related transactions costs at these sites.

While some of the liability options being proposed would reduce current sources of transaction costs, all the options would create new sources of transaction and administrative costs. For example, most of the proposals to eliminate retroactive liability (whether the cutoff date employed is 1981 or 1987) call for those PRPs who have already incurred site study and cleanup costs to be compensated, either in a cash payment or through a credit towards future trust fund taxes. As there has been no requirement that PRPs report Superfund related expenses to the EPA, no records exist that could be used to determine what costs should be included in this compensation. Thus, new administrative costs would be involved, as PRPs create records of expenses incurred and the government reviews these records to determine whether the costs incurred are in line with the requirements of the National Contingency Plan. Another new source of transaction costs will likely be the litigation that will ensue as those not released from liability seek to show that they too ought to be included in the category of PRPs or sites no longer subject to liability.

Perhaps the greatest concern, in terms of increased administrative and transaction costs, arise for those liability approaches that shift responsibility for cleanups from PRPs to the federal government, such as the NETF and Treasury proposals. One thing on

which most in the private sector agree, is that PRPs can implement cleanups for a much lower cost -- for the same cleanup -- than the federal government. There have been many inquiries into the Superfund contracting process, and as noted in Vice President Al Gore's national performance review, the fundamental structure of government contracting is fraught with unnecessary transaction costs. Thus, it is legitimate to question whether *total* transaction costs would really be reduced under many of the alternative approaches being discussed. It may well be that the alternatives would simply trade one source of transaction cost (litigation) for another (government red tape).

Relaxing Superfund's liability standards would have some adverse effects.

Any alternative that eliminates Superfund liability for a subset of sites could diminish--if not eliminate--the current incentives PRPs face both to clean up sites not on the NPL and also to carefully handle hazardous substances not regulated under other statutes. The effect of any change in liability on non-NPL cleanups is straightforward. Any release from liability for a specific category of sites (as in Options 3 and 4) would greatly diminish the incentive to clean up similar sites not on the NPL. It is much more difficult to determine how a change in liability would affect incentives for the careful management of hazardous substances. Logically, eliminating the retroactive aspect of Superfund liability, as in Option 4, should have no effect on prospective waste management practices. Nevertheless, the imposition of retroactive liability in 1980 at least initially jolted everyone dealing with hazardous substances into recognizing these substances' potentially harmful effects. We cannot discount the possibility that abolition of retroactive liability would lead to backsliding by at least some PRPs in their future waste management practices.

Any of the modifications to the present liability standards will create at least

some new inequities, even as they ameliorate others.

Any overall evaluation of the options considered on grounds of fairness depends on which concept of fairness one prefers. We identified three possible interpretations of fairness in our report: that those who created the problem should bear the costs of remediating it (the "polluter-pays" principle); that the liability standards should treat as equals all PRPs who handled hazardous substances in a similar fashion; and, finally, that rule changes be made prospectively, not retroactively. Each of the options we considered does well against one or two of these three possible interpretations of fairness; none does well against all three.

For example, eliminating retroactive liability would address one possible inequity created by Superfund. But using the trust fund to clean up a site owned and operated by one company throughout the life of the site would be a clear violation of the polluter-pays concept. Similar conflicts arise with respect to each option we consider.

One of the key elements of "fairness" revolves around the question of who pays for site cleanups. To the extent that some of those responsible for contamination at sites either are bankrupt or not financially viable, there really is no way to apportion these costs fairly. Perhaps the fairest system would be to use general revenues to finance the cleanup of sites created before Superfund was enacted and to cover the cost of orphan shares. However, this is not a very likely solution in today's economic climate. While site-specific liability may be unfair in some situations, it does at least place the financial burden on organizations that had something to do with the site. RFF analysis of data on 970 NPL sites where information was available regarding the type of facility on the site and the date disposal operations closed (see Table 1, below) indicate that approximately 40% of those sites where waste disposal operations closed before 1981, and a similar percentage of those that closed before 1987, are facilities that tend to have few PRPs --

chemical plants, wood preservers, mining sites and captive waste management facilities.

Table 1.

Date NPL Sites Closed by Facility Type

Facility type	Total sites		Pre-1981 sites		Pre-1987 sites		Sites still operating	
Waste management facilities (1)								
Landfill	257	(26%)	166	(31%)	232	(29%)	12	(11%)
Recycling	82	(6%)	40	(7%)	76	(9%)	4	(4%)
Other	57	(6%)	39	(7%)	54	(7%)	2	(2%)
Subtotal	396	(41%)	245	(46%)	362	(45%)	18	(16%)
Industrial facilities (2)								
Industrial plant	382	(39%)	165	(31%)	279	(35%)	77	(66%)
Captive waste management	66	(7%)	55	(10%)	61	(8%)	3	(3%)
Subtotal	448	(46%)	220	(41%)	340	(42%)	80	(70%)
Other (3)	126	(13%)	73	(14%)	105	(13%)	16	(14%)
TOTAL (970 sites)	970	(100%)	538	(100%)	807	(100%)	114	(100%)

Source: Preliminary data/RFF database

(1) Waste management facilities include all landfills – municipal and commercial landfills and municipal and commercial codisposal landfills – except those used solely by one company, and recycling and other waste management facilities.

(2) Industrial facilities include industrial plants such as chemical manufacturing, oil refining, mining, wood preserving, coal gasification, all other manufacturing, and multiple industrial facilities and those waste management facilities for the sole use of one company (i.e. captive industrial landfills and captive industrial waste management facilities).

(3) "Other" includes transportation facilities, commercial facilities, contaminated areas, and miscellaneous sites.

The use of a broad-based tax to finance cleanups will result in some companies paying for cleanup who may have no liability at any Superfund site in the country -- also not a "fair" outcome.

Much better data are needed to assess the financial implications of the present liability standards as well as any proposed alternatives to them.

The United States does a very poor job of keeping track of any expenditures related to Superfund other than those made by EPA. This makes it extremely difficult to estimate the full financial and economic implications of any liability option, including the current program. There is a great deal of uncertainty about each of the building blocks on which our cost estimates are based: the average cost of a cleanup, the number of sites likely to be affected by each of the options, the time horizon over which cleanup will take place, the share of total expenditures at a site devoted to legal fees, and so on. Any serious consideration of the future funding needs for Superfund--even absent any changes to the law--must be based on a better assessment of the costs of the current program to both EPA and PRPs. PRPs should be required by law to report annually to EPA on the costs incurred for site studies and cleanup activities at all NPL sites, as well as a brief summary of the type of remedial actions taken at each site.

Our work did not address two important issues relating to changes in Superfund's liability standards and taxing scheme: the effect of any change in liability on the kinds of remedies selected and the ability of EPA to effectively manage a large number of site cleanups at one time. These issues must be borne in mind if serious consideration is given to changing Superfund's liability scheme.

In evaluating liability alternatives, we assumed that remedy selection at NPL sites would not be affected by a change in the origin of the cleanup funds. However, if government financing of remedial actions through the trust fund leads to either gold-plated or shoddy remedies, this effect should be factored into an evaluation of possible legislative changes. Similarly, in our work, we assumed that EPA could manage

effectively even a great expansion in the number of sites cleaned up using the (augmented) trust fund. This assumption should also receive careful scrutiny if any serious consideration is given to modifications in the present liability standards.

Summary

I would like to caution the Subcommittee that any evaluation of the liability standards must address the diversity of sites on the NPL. What we found in our analysis of liability options is that the effect of the liability standards differs greatly if one is talking about multi-party waste management facilities (such as landfills where industrial waste has been co-disposed with municipal waste or where batteries or used oil was recycled) than if one considers the effect of liability on industrial facilities which tend to have few parties (such as chemical plants, wood preserving or electroplating sites, or other manufacturing operations) where the owner or operator at the site is usually also the only "generator." This distinction between multi-party and single-party sites is extremely important in thinking about the strengths and weaknesses of the liability system.

Are there large transaction costs? At some sites, certainly. Are there large transaction costs at all sites? Probably not. It is the large waste management sites, which have the most parties, where the allocation of costs among the parties is most difficult, and where outrage at the joint-and-several aspect of Superfund liability is most intense. When Superfund was amended in 1986, the law included two new provisions, regarding *de minimis* parties and mixed funding, that were intended to help ease the allocation challenge at multi-party sites. Unfortunately, these tools have been little used.

The bottom line is that the current liability standards are probably extremely

effective in creating an incentive to cleanup sites on and off the NPL for some kinds of facilities, and less so for others. Similarly, the current liability standards probably do spawn huge transaction costs at some sites, but these sites do not make up a large percentage of total NPL sites. In thinking about the liability standards, it is important for Congress to identify what behavior it is trying to encourage:

-- cleaning up sites on the NPL

-- providing an incentive for cleanup of sites not on the NPL

-- providing an incentive for better management of hazardous substances,

as well as consider what kinds of behavior and sites would be affected by any change in liability.

In closing my discussion of the liability scheme, I want to briefly address the criticisms that the liability scheme slows cleanup, is "unfair, " and that "transaction costs are too high," as these are statements I am sure you have heard and will hear repeatedly over the coming months.

While it makes sense that the need to find PRPs to pay for cleanups slows cleanup, it seems obvious that the major reason why cleanups have been so slow are:

- the lack of clear guidelines for remedy selection

- a cumbersome and bureaucratic remedy selection process, and

- high turnover and inexperience of site project managers in some EPA regional offices.

These problems will not be addressed by any change in the liability system. Thus, while changing the liability system might speed cleanup, it is difficult to conclude that the major source of slow cleanups is the liability system.

There probably is no "fair" Superfund financing scheme -- either in terms of liability, or in terms of the taxes to finance the trust fund. Each of the liability schemes introduces a new element of unfairness. Eliminating liability for co-disposal facilities, in order to reduce transaction costs, would be unfair to those who managed wastes on-site and would remain liable. If Congress chooses to adopt more of a public works approach, as has been suggested by proponents of the National Environmental Trust Fund, the trust fund would pay for cleanup at single-party industrial sites, where it seems obvious the owner/operator of the facility should pay. As always, there are tradeoffs among different liability schemes -- but which is better depends in large part on the goal of the program is and who pays for cleanup.

Another argument against the current liability system is that transaction costs are too high. As noted earlier, analysis by RAND suggests that these costs are probably highest at sites with many PRPs. Any liability system where EPA has to determine who sent what waste to a large landfill or recycling facility will probably have large transaction costs. On the other hand, it is hard to imagine that putting the EPA in the drivers seat for implementing cleanups at most or all NPL sites will do anything other than lead to delays and higher administrative costs, as the Agency has no choice but to comply with government contracting rules and regulations. Releasing *de minimis* parties from Superfund liability altogether, *de minimis* buyouts, mediation or aggressive mixed funding would all help to decrease intra-PRP transaction costs, although these solutions might well shift some transaction costs to the government. The toughest issue regarding transaction costs is the burgeoning litigation between PRPs and their insurers.

2. Financial Implications on the Trust Fund

Before discussing the implications of alternative liability proposals on the size of the trust fund, I think it is important to put the costs of Superfund cleanup in context. While Superfund attracts a lot of attention, the costs of the program are really quite small, both in terms of the national economy as a whole and as compared to the total costs of other environmental programs. The costs to most sectors of the economy is not that large, save the potential costs to the property casualty insurance sector. This is not to take away from the fact that the costs of Superfund to an individual company may be devastating. However, I think it is important to make clear that, in some ways, we are spending a tremendous amount of time debating the financial implications of a relatively small program.

With that, I will turn to the financial impacts of Superfund liability. One of the most important issues regarding any proposal to change Superfund's liability approach is how much in additional trust fund revenues would be required. Both questions of "who pays?" and "how much" go to the heart of the fairness issue.

For each of the alternative approaches we considered, we estimated how much additional revenue would need to be added to the trust fund to implement the option, assuming that the current pace of the program is maintained. Given the lack of hard data on actual site cleanup costs, we made a set of assumptions regarding the basic components of the Superfund program that we used to estimate the annual and cumulative funding requirements of the current program and the four alternative approaches considered. Changing any of these assumptions would have a major impact on our estimates of both the annual and cumulative costs of the program. It should be

noted, that in developing our estimates, we assume no change in cleanup standards. Some of the liability proposals circulating these days assume that no change will be needed in the size of the trust fund, based on the assumptions that there will be a relaxation in cleanup standards. An additional assumption in some of the proposals, also worth noting, is that the trust fund will pick up the cost of natural resource damages, although few of the proposals include increased revenues to cover these costs.

In my testimony today, rather than provide the data from the RFF report of over a year ago, I thought it might be helpful, first, to outline the assumptions that need to be made to estimate the financial implications of any liability approach, and, second,. to provide an estimate of the additional trust fund revenues likely to be needed to pay for the Treasury proposal. As an attachment, I am including the methodology we used in the 1991 report to estimate the cost to the trust fund of the liability alternatives we examined.

Ideally, we would be able to conduct sophisticated analyses of the financial implications of each of the major liability alternatives on the table -- funding orphan shares and eliminating retroactive liability (as of some specific date) -- as well as how these estimates would change if, for example, no PRPs at single-party sites are released from liability. RFF is, in fact, developing a database to allow us to do just that -- but not surprisingly some of the key data is simply not available, such as estimates of site-specific cleanup costs.

Since we can not make sophisticated estimates of the financial implications of alternative liability approaches, we must, of necessity, rely on a more simple-minded approach. What is important in this kind of estimate is to state clearly the assumptions

being used.[3] In addition to articulating the elements of the proposed change to liability standards, assumptions need to be Assumptions need to be made about each of the following factors:[4]

- Number of sites
- Average cost of site cleanup
- Time period over which cleanup costs incurred
- Percentage of cleanup costs now being paid by PRPs

Number of sites

In our estimates, we assume that the current NPL has approximately 1,100 non-federal facility sites, and that 100 sites a year will be added to the NPL for the next five years. It should be noted that changes to the liability standards could have a dramatic effect on the number of NPL sites. For example, if liability is eliminated for any category of sites -- pre-1981 or pre-1987 sites or co-disposal landfills -- this would create a tremendous incentive for owners and operators of these sites to get them on the NPL to obtain trust fund financed cleanups.

Average site cleanup costs

We really have very little reliable data on cleanup costs. Ideally, we would be able to assign a specific cleanup cost to each site. In RFF's NPL database, we are using different average site cleanup costs for different kinds of NPL sites. Thus, mining sites are estimated to cost over $300 million, while the average cost of a landfill is estimated at $30 million. Still, the paucity of data makes even these estimates (based on research

[3]This discussion is included to help others cost out liability alternatives. Any of the assumptions can be changed, but this should at least provide a framework for estimates of needed trust fund revenues.

[4]If the proposal includes funding of orphan shares by the trust fund, an unambiguous definition of what constitutes the "orphan share" is critical. Some have suggested the orphan share include the cleanup costs of municipal solid waste; others have suggested orphan shares include the shares of current owners/operators who purchased contaminated properties. Some define the orphan share simply as the share of any PRPs not financially viable. Needless to say which or these categories of PRPs is considered "orphan" has tremendous implications for the size of the orphan share and the additional revenues that would be needed by the trust fund.

done by the University of Tennessee) suspect. For a quick and dirty estimate, most analyses have used an average cost of cleanup for all sites. In our earlier RFF report we assumed the average site cleanup to cost $40 million. More recent work by EPA and others suggest that the average cost of cleaning up an NPL site may be closer to $30 million, a number we employ in our more recent estimates of the trust fund implications of alternative liability approaches.

Time period over which cleanup costs incurred

Most people are concerned not only with the total cost of NPL cleanups shifted to the trust fund, but with the annual implications for needed trust fund revenues. In order to estimate needed annual tax revenues it is important to know when costs would be incurred. For example, RFF's 1991 report assumed, mostly for the sake of convenience, that cleanup costs would be spread over ten years, which is estimated to be the duration from when a site is first listed on the NPL and when "construction is complete." Recently, some have suggested that cleanup costs (remedial actions and remedial designs, "RD/RAs") are more likely to be incurred over a shorter time frame, such as five year period. This assumption makes a tremendous difference in terms of annual trust fund revenues needed. If, for example, one assumes that the cost of shifting all current pre-1981 NPL sites to the trust fund is around $13 billion, additional trust fund revenues needed would be $1.3 billion if these costs are incurred over ten years, but would be twice as much, $2.6 billion, if these same costs are incurred over five years.

Percentage now being paid by PRPs

Any estimate of the shift in cleanup costs from PRPs (as a result of site-specific liability) to the trust fund must make some assumption of how current cleanup costs are distributed between the trust fund and PRPs. Recent EPA data suggests just over 70% of cleanups (at the RD/RA stage) are PRP-lead. This implies that 30 percent of cleanups

are currently being paid for by the trust fund. Thus, any estimate of the costs shifted to the trust fund pertains only to the 70 percent of sites now being paid for by PRPs as a result of the liability standards.

As an example, I thought I would present an estimate of the cost of the Treasury proposal for current NPL sites. The costs would, of course, be higher, if the cost of additional NPL sites are added. This estimate assumes that monies already expended by PRPs at sites released from liability would be compensated. It also assumes that the Treasury proposal results in no change to strict liability.[5] If, in fact, a change in strict liability is intended -- for example, releasing current owner/operators from liability if they did not cause contamination at the site -- then the costs to the trust fund would be larger.

Calculation:

1. Average site cleanup cost = $30 million
2. Total cost of cleanup = $33 billion
   (1100 sites x $30 million)
3. PRPs now paying for 70% of site cleanups
   or $23.1 billion of the total of $33 billion
   (70 % of $33 billion = $23.1 billion)
4. RFF data suggests that 55% of NPL sites are "pre-1981 sites."
   All the costs of cleaning up these sites (55% of $23.1 above),
   or $12.7 billion would be shifted to the trust fund.
5. According to EPA data, 41% of the wastes at sites that
   continued to operate after 1981 were deposited before 1981.
   Thus, 41% of the remaining $10.4 billion, or $4.3 billion, of PRP
   cleanup costs would be shifted to the trust fund.
6. Finally, of those costs still to be paid for by PRPs ($6.1 billion),
   25%, or $1.5 billion, assumed to be orphan shares.

With all these changes the total amount of cleanup costs shifted from PRPs to the trust fund would be $18.5 billion.

[5]The language of the Treasury proposal is unclear, as it pertains to strict liability, as it mentions that 'strict liability should be based on behavior not status."

Needed annual increase to trust fund:
If costs incurred over five years: $3.7 billion
If costs incurred over ten years: $1.8 billion

This framework can be used to estimate the financial implications to the trust fund for any liability alternative.

3. RFF Research on Superfund

Most of the research being conducted by RFF on Superfund is being conducted under the auspices of the Center for Risk Management. The Center is a multi-disciplinary center at RFF that engages in a comprehensive program of research, policy analysis, and education on the management of risks to public health and the environment. Currently, the Center has two Superfund research projects underway, which are described below.

The Economic Impact of Alternative Superfund Financing Schemes

While it is known that the costs involved in complying with the current Superfund program are enormous, it is not known who is actually bearing these costs. We are beginning to understand how much potentially responsible parties and their insurers are spending on both transactions costs and on site cleanups. To date, however, no one has attempted to estimate the distribution of initial costs under the current Superfund liability system or examine carefully the indirect effects of these costs on other industries.

Resources for the Future and the Brookings Institution are in the final stages of completing research analyzing the effects of the current Superfund financing program on different sectors of the economy, compared to other possible liability and taxing

systems. The alternative schemes being examined include scenarios where each of the three current Superfund taxes are increased, where all three of the taxes together are increased, where additional revenues are raised by a tax on the insurance industry, and finally, one in which a small percentage of a value added tax (should a VAT be adopted for other reasons, such as to finance the Administration's health care proposal) would be tagged to finance the creation of a larger trust fund for site cleanups.

The project has four major tasks. The first task, which is almost completed, is to develop baseline information on who is likely to bear the costs under the current financing scheme in Superfund on a site-by-site basis. The sites currently on the Environmental Protection Agency's National Priorities List (NPL) have been examined. The next task is to estimate both the change in the total transactions and cleanup costs and the change in needed trust fund revenues under a variety of different liability regimes. The third task is to analyze the incidence of different taxing mechanisms to raise additional trust fund revenues. Finally, we are comparing and contrasting the short and long-term economic effects of the current Superfund program and of the alternative liability and tax-based funding mechanisms evaluated on specific industries. These comparisons will show how different industries would be affected by the various financing mechanisms and help inform the policy debate regarding the future of the Superfund program.

Researchers involved in the project are Katherine Probst, fellow, Center for Risk Management, RFF; Paul Portney, vice president, RFF; Robert Litan, U.S. Department of Justice (on leave from the Brookings Institution); and Don Fullerton, Carnegie Mellon University and the University of Virginia. RFF's work is funded in large part by a cooperative agreement with the U.S EPA's Office of Policy, Planning and Evaluation. The report will be completed in early 1994, and we plan on a publication date in the late

Spring or early Summer of 1994.

A Qualitative Benefit-Cost Analysis of Superfund Cleanups

One major criticism of the Superfund program is that cleanups at sites cost too much and achieve too little, that is, the benefits of the program are not worth the costs. Moreover, there is little consensus among different groups about the appropriate degree and scope of remedial efforts. This lack of consensus stems in large part from disagreements about the fundamental purpose of the Superfund program. Arguments about whether or not containment remedies are acceptable are really arguments about whether our national cleanup policy should be simply to reduce human exposure to contamination (which can often be achieved through containment remedies) or to "clean up" sites (which could involve the permanent destruction or immobilization of contaminants). Developing a sound remediation strategy that falls somewhere between these two extremes is very difficult.

Researchers in the Center are conducting a study to help develop better understood goals for site remediation. The research has two major components. First, the team will develop a benefits framework that incorporates the specific attributes of the Superfund program and builds on academic research regarding different notions of risk. Second, the team will select 25 sites on the Environmental Protection Agency's National Priorities List (NPL) and will assess the qualitative benefits and costs accruing from site cleanup. This analysis will hopefully lead to some conclusions about the kinds of benefits being achieved under the current Superfund cleanup policy and the relationship between benefits and costs of different cleanup policies.

Center researchers involved in the project are Katherine Probst, fellow; Terry

Davies, director; and Janet Stone, research associate. This work is funded in large part by a grant from the U.S. EPA's Office of Solid Waste and Emergency Response. The project began in January 1993 and will take 18 to 24 months to complete.

In addition, my colleagues in RFF's Energy and Natural Resources and Quality of the Environment Divisions are conducting two studies related to Superfund issues. In one study, an RFF research team is examining the question of whether Superfund liability is a contributing factor to the location of new industrial facilities to "green fields" locations, sites which previously have not been used as industrial sites. In a second study, researchers are looking at the applicability of benefit-cost analysis to the cleanup of DOE facilities. More in-depth descriptions of these projects follow.

Superfund Liability and Real Estate Transactions:
Has CERCLA Created an Undesirable Trend Toward "Greenfields" Development?

In an effort to better understand the far-reaching impact of CERCLA and its amendments, RFF researchers are conducting a project to explore the effect of Superfund liabilities on the transfer of commercial industrial properties. Anecdotal evidence suggests that CERCLA's imposition of retroactive and joint and several liability has created a significant disincentive to develop existing industrial properties, or "brownfields." The result, it is argued, is the increased development of -- and export of heavy industry to -- greenfield sites. Clearly, greenfield development may not be socially desirable due to the costs of infrastructure necessary to support new development, the potential degradation of relatively pristine lands, and the export of jobs and tax revenue from depressed urban areas. However, the extent of inefficient greenfield development, and the degree to which such development is due to Superfund, are unresolved issues.

RFF's research explores, both conceptually and empirically, the interaction of CERCLA liability and commercial industrial property transactions. While systematic data on location decisions impacted by Superfund are unavailable, the study is using several case studies to identify those aspects of the CERCLA regime which most inhibit the socially desirable transfer and development of brownfield properties. With insights derived from these case studies and from a survey of CERCLA-related case law, the project will also conceptually explore the impact of Superfund on plant location and facility expansion decisions, some aspects of real estate lending, and seller/purchaser agreements regarding the division of future liabilities. With this better understanding of the way in which Superfund can influence real estate transactions, the study derives policy recommendations designed to encourage efficient brownfields development.

The project is expected to be completed by early 1994. The project team consists of Molly Macauley, Jim Boyd and Mary Elizabeth Calhoon of the Environment and Natural Resources Division, and Winston Harrington of the Quality of Environment Division.

Costs and Benefits of Nuclear Waste Site Cleanups: A Scoping Study

For more than 45 years, the U.S. Department of Energy (DOE) and predecessor agencies have operated laboratories, nuclear reactors, and testing grounds for the purpose of producing nuclear materials and weapons for national defense. Under current law, environmental problems at nearly 100 of these DOE sites must be remedied. Because the cost of doing so is estimated to be $100 billion or more, questions are being raised about whether funds to clean up the sites are being well spent and whether the approach to prioritizing the cleanups should include benefit-cost analysis. RFF

researchers are investigating the appropriate extent to which benefit-cost analysis can be used to achieve efficiency in the cleanup of nuclear waste sites. The researchers are also investigating whether the on-site data being collected by DOE and the U.S. Department of Defense to determine the order and extent of cleanups are sufficient for the application of benefit-cost techniques. In pursuing these investigations, they are examining some philosophers' objections to benefit-cost analysis on grounds that it ignores ethical concerns. Thus far they have discovered that some of the objections can be easily rebutted, while others can be addressed by introducing public participation into a particular application of benefit-cost analysis.

The project team consists of Allen V. Kneese and Alan J. Krupnick, of RFF's Quality of the Environment Division, along with consultants Linda Trocki and Kenneth Eggert.

Thank you very much for asking me to testify here today. I would be happy to answer any questions.

78-746 - 94 - 5

Attachment: Methodology for Estimating Additional Trust Fund Revenues Needed for Alternative Liability Approaches, from 1991 RFF Report *Assigning Liability for Superfund Cleanups: An Analysis of Policy Options*.

The assumptions underlying our calculations were as follows:

1. We assumed that the average cost of a remedial action would be $40 million per site. Since EPA estimates remedial actions to cost $27 million per site, our estimate of the cost of the current program is higher than EPA's. If the average cost is closer to $25 million, as recent data suggests, then all of the numbers in our report would need to be adjusted downwards.

2. We assumed that the total number of sites on the current NPL that are relevant to our analysis is 1,115. This was the number of sites (other than federal facilities) on the NPL when we received site-specific information from EPA in July 1991. We did not calculate the costs associated with the 100 new sites EPA expects to add to the NPL each year because of the difficulty of identifying how many of these sites would be affected by each of the liability options considered. Note, however, that at 100 new NPL sites a year, 1,000 new sites would be added in the next 10 years, nearly doubling the Superfund program; this would imply additional remedial action costs of $40 billion.

3. Although the relative shares of the different components of EPA's expenditures for functions other than remedial action activities (that is, for enforcement, site oversight, and so on) are likely to change over the years and for different policy options, we did not address such changes. To estimate such implications would require a sophisticated analysis of EPA's budget. In addition, over the long run the dominant

factor in total Superfund cost is the cost of implementing site remedies.

4. We assumed that it takes 10 years from the time a site is proposed for inclusion on the NPL until the final remedy is fully implemented. Furthermore, for the sake of simplicity, we assumed that remedial action costs are spread evenly over the 10 years even though this is not the pattern one observes in reality. We did so because we doubt that Congress would want to address appropriations levels that vary from year to year, considering the paucity of data on the magnitude and timing of site cleanup expenses.

Using all these assumptions, we calculated the additional trust fund revenues for remedial actions (only) that would be needed to implement each of our four alternative approaches. We also calculated the "implied" PRP expenditures for remedial actions. This calculation is made by deducting planned EPA expenditures for remedial actions from our estimate of the total cost of cleanup for all sites.

Expanded Mixed Funding for Orphan Shares. We assumed that there would be orphan shares at 73 percent of the 1,115 NPL sites and that this orphan share would be 10 percent of these remedial action costs. With total remedial action costs for 1,115 sites estimated at $44.6 billion, 73 percent of these costs would equal $32.6 billion; a ten percent orphan share would amount to just under $3.3 billion, or an increase of $325.6 million in trust fund expenditures annually. By shifting approximately $3.3 billion in remedial action costs to the trust fund, implied cumulative remedial action expenditures by PRPs would be reduced to $34.1 billion.

Liability Release for All Closed Co-disposal Sites. We estimated that 250 sites on the current NPL are closed co-disposal sites and that none of these sites is now being cleaned up using trust fund monies. Based on previously outlined assumptions, the total

remedial action costs for these 250 sites would be $10 billion. Spreading these costs evenly over 10 years implies an annual increase in trust fund monies of $1 billion. As a result of this change in liability, PRP costs for remedial actions would be decreased by $10 billion, bringing them from $37.3 to $27.3 billion.

Liability Release for All Pre-1981 Sites. Based on information collected by EPA for Resources for the Future, we estimated that 580 of the 1,115 sites on the NPL are "pre-1981." The total remedial action costs for these sites would equal $23.2 billion, which would require an annual increase in the trust fund of $2.3 billion assuming these costs are spread over ten years. This shift of remedial action costs to the trust fund would reduce PRP remedial action costs to approximately $14.0 billion.

Liability Release for Current NPL Sites. To estimate the cost of cleaning up the entire NPL with trust fund monies, we simply took the implied PRP remedial action costs under the current program (see section A above) of $37.3 billion, average them over 10 years, and added them to the baseline yearly costs of EPA's current program. This would require a $3.7 billion increase in trust fund revenues annually. PRP remedial action expenditures for current NPL sites would, of course, be eliminated.

Mr. SYNAR. Dr. Chavis, welcome to the subcommittee. We look forward to your testimony.

STATEMENT OF DR. BENJAMIN F. CHAVIS, JR., EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE [NAACP]

Dr. CHAVIS. Thank you, Mr. Chairman. My full written testimony is submitted for the record.

Mr. Chairman, members of the subcommittee, I appreciate you giving the NAACP an opportunity to present to you our perspective on the reauthorization of Superfund.

Let me just, since we only have 5 minutes, say one sentence to kind of characterize where we are coming from.

The issue of reauthorization of Superfund for us is an issue of life and death. While there are many debates about this issue, the NAACP comes representing communities that are disproportionately exposed to these hazards. For 13 years, by and large, these sites have not been cleaned up and the present system has not worked.

The present liability system has not worked and so it needs to be changed. And that is the thrust of our comments and our testimony today.

I believe that the most sound approach to solving our Nation's problems is to seek harmony and confluence between the multiple goals of various stakeholders in a given issue. This belief undergirds the NAACP's approach to the Superfund debate. Simply put, we do not believe the interests of the people-of-color community will be met if conflict continues to block consensus in this area.

For years, Congress, the media, businesses, and even environmental groups have seen environmental issues as largely white, middle-class concerns, but in fact the minority community is among the most adversely affected and the most disenfranchised when it comes to addressing environmental problems.

As a result, environmental issues are increasingly more important to minority communities. Unfortunately, when it comes to toxic waste cleanup under the Federal Superfund law, one sees only conflict and not progress. This conflict has had a lot to do with Superfund's disappointing record. In 13 years, fewer than 150 of the 1,200 top priority sites have been cleaned up, not to mention the 3,000 or so that the EPA says will eventually make it onto the NPL.

Thousands of lawsuits are still pending. More than 25,000 individuals and organizations are involved. And billions of dollars are being frittered away on activities that have nothing to do with cleanup or public health. But an effective Superfund is vitally important to all Americans, in particular to minorities.

Superfund sites are endangering the health of people in our community and the delays in cleaning up these sites undermines economic development opportunities that could create jobs in our communities. So we have a major stake in the Superfund reauthorization debate.

Unlike many others who come to you, the people-of-color communities we work with are living with daily threats in Superfund site

areas. We do not come before you with an ideological agenda or baggage from past debates. We come before you with one agenda: Getting sites cleaned up effectively and promptly through a process that promotes dialog, trust, and opportunity and which ensures that these kinds of threats will not reappear.

With that backdrop, let me explain our approach to Superfund in summary form.

We believe that Superfund should above all be a public health and environmental protection program. But as I said, this was clearly not the current focus. Instead distrust, litigation, and delay dominate. Any Superfund reform plan must end the warfare which dominates Superfund today. Over the last few months, I have discussed this view with members of the business community to see if they would support the goals of environmental justice advocates.

In a series of meetings with John W. Johnstone, chairman, president, and chief executive officer of the Olin Corp., and Joseph W. Brown, chairman, president, and chief executive officer of Talegen Holdings, formerly Crum & Forster Insurance Co.'s, we were able to reach an agreement on a Superfund agenda that I believe is the only one to date that truly meets the test of meeting the priority goals of every primary Superfund stakeholder.

The plan is really straightforward. First, it calls for a reauthorizing and reorganizing Superfund into a program focused on public health and environmental protection. Second, it calls for a substantial expansion of funding for cleanup and other priorities. The additional funds would be raised primarily with increased business taxes.

Third, cleanup funds would be retargeted on those sites which alone or in combination with other environmental risks in the area pose the greatest dangers to the affected citizens. This is especially important to people of color because most of the most dangerous sites are in our communities.

Fourth, it calls for improved remedy selection so effectiveness drives the choices. In all cases, it insists that protection of public health must be the standard, with factors such as land use and available technology taken into account if appropriate.

Fifth, it calls for replacing today's site-by-site liability financing at multiparty sites with an expanded fund supported primarily by larger taxes on business. This expanded fund would pay to clean up hazardous waste legally disposed of at sites before a set cutoff date in the past, and to restore natural resources.

On this, I want to be clear. EPA, members of the Washington environmental community, and others are pursuing liability reform alternatives that strike us as being inadequate. We believe that the funding—that the fundamental liability and funding reform are inextricably linked to meeting the environmental justice agenda.

In fact, just today I have just returned from Cleveland where I was at an event with EPA Administrator Browner at which she announced a grant to train minorities in environmental remediation. We, of course, are pleased with this grant. But we want to say for the record that the only way to really generate meaningful progress in these and other areas important to us is by replacing the site-by-site liability financing system at multiparty sites with an expanded fund supported primarily by larger taxes on business.

Six, it calls for much more empowerment of local communities through greater and earlier participation in Superfund decisions and through retraining of minority groups in the business of remediation.

Seventh, it calls for refocusing the resources of existing Federal health, economic, and community development programs on communities which have been disproportionately harmed by toxins.

In conclusion, Mr. Chairman, there is something for all stakeholders in our paradigm, whether their paramount goals are public health and environmental protection, prompt cleanup, lower legal costs, fairness, making polluters pay, community participation, or ensuring sound waste management.

These and other goals can be realized but only if we take the opportunity we have in the next year to move beyond the ideological and the confrontational thinking which has dominated Superfund. It is time to work together to create a new cooperative model for Superfund which achieves results on the ground and not in the courtrooms.

We have copies of a more detailed enumeration of the eight point program, Mr. Chairman, I think members of the committee have seen. I would like to thank you and your leadership and hope that you and all Members of the Congress would expedite reauthorizing Superfund that would bring justice at the grassroots level and in particular those communities that are already disproportionately exposed and for whom for 13 years have not been cleaned up.

[The prepared statement of Dr. Chavis follows:]

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DR. BENJAMIN F. CHAVIS, JR.
Executive Director/CEO

TESTIMONY OF DR. BENJAMIN F. CHAVIS, JR.

EXECUTIVE DIRECTOR/CHIEF EXECUTIVE OFFICER

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

TO THE HOUSE SUBCOMMITTEE ON

ENVIRONMENT, ENERGY AND NATURAL RESOURCES

NOVEMBER 8, 1993

"The Struggle Continues . . . "

Mr. Chairman, Members of the Subcommittee, I appreciate your giving me the first opportunity of any congressional committee to share with you the NAACP's views on the changes that must be made so that Superfund finally meets the needs of the People of Color community and all other Superfund stakeholders.

Before I discuss Superfund, I want to give you some perspective on why we have taken such an active role in this debate.

A few months ago, the NAACP signed a historic agreement with Flagstar Companies, the owner of Denny's and other restaurants, committing the company to an unprecedented and far reaching effort to recruit and train minority managers and non-managers, as well as minority franchisees. The agreement also included a pledge by Flagstar to increase its use of minority firms for professional services in banking, insurance, and other areas.

The agreement was properly hailed as a dramatic example of a major American corporation recognizing that it is good business to serve a broader set of community interests than has traditionally been the case. But I believe it also demonstrates that the most sound approach to solving our Nation's problems is to seek harmony and confluence between the multiple goals of various stakeholders in a given issue. This belief undergirds the NAACP's approach to the Superfund debate. Simply put, we do not believe the interests of the People of Color community will be met if conflict

continues to block consensus in this area.

For years, Congress, the media, businesses, and even environmental groups have seen environmental issues as largely white middle class concerns. But in fact, the minority community is among the most adversely affected, and the most disenfranchised when it comes to addressing environmental problems.

A series of studies and reports, starting in 1982 with a U.S. General Accounting Office report and including studies by the United Church of Christ and the National Law Journal, found that people of color face disproportionate discrimination when it comes to siting and cleaning up hazardous waste sites. For example, the NLJ study, released in late 1992, found that it takes 20 percent longer for hazardous waste sites in minority communities to be placed on Superfund's National Priorities List.

Findings like these have made environmental issues increasingly more important to minority communities. Unfortunately, when it comes to toxic waste cleanup under the federal Superfund law, one sees only conflict, not progress.

This conflict has had a lot to do with Superfund's disappointing record. In 13 years, fewer than 150 of the 1,200 top priority sites have been cleaned up (not to mention the 3,000 or so that EPA says will eventually make it onto the NPL);

thousands of lawsuits are pending; more than 25,000 individuals and organizations are somehow involved; and billions of dollars are being frittered away on activities that have nothing to do with public health.

But an effective Superfund is vitally important to minorities: Superfund sites are endangering the health of people in our communities and the delays in cleaning these sites up undermines economic development opportunities that could create jobs in our communities.

So we have a major stake in the Superfund reauthorization debate. Unlike many others who come to you, the People of Color community we work with are living with Superfund threats daily. We don't come before you with an ideological agenda or with baggage from past debates. We come before you with one agenda: getting sites cleaned up effectively and promptly through a process which promotes dialogue, trust, and opportunity, and which ensures that these kinds of threats will not reappear again.

With that backdrop, let me take a few minutes to tell you what we think needs to be done to Superfund.

We believe Superfund should be, above all, a public health and environmental protection program. But as I said, that is clearly not the current focus. At the

typical Superfund site, dozens of businesses, small and large, local governments, hospitals, and individuals battle with one another, with EPA, with state officials, and with citizens over what needs to be done at the site and who should pay to do it. They do battle because of Superfund's retroactive, joint and several financing system. Then many of these parties sue their insurers. What a colossal waste of time, creativity, and money! Worse, it divides the community. Rather than forging a constructive partnership aimed at public health protection and environmental cleanup, the current system foments distrust and delay.

Thus, it was clear to me when we began developing a position on Superfund reform that any plan must end the warfare which dominates Superfund today. But something else became clear as well: People of Color, local citizens, environmentalists, small business, local governments, big business, and insurers all want much the same from Superfund: a focus on public health, speedier cleanups, more public participation, maintenance of a "polluter pays" concept, lower transaction costs, better remedy selection, and more fairness and certainty. It seemed to me that if all parties could approach this with a sensitivity to one another's concerns, we could find common ground. We could make Superfund reauthorization the environmental equivalent of the Denny's agreement.

Over the last few months, I discussed this view with members of the business community to see if they would support the goals of environmental justice advocates.

In a series of meetings with John W. Johnstone, Chairman, President and Chief Executive Officer, Olin Corporation and Joseph W. Brown, Chairman, President and Chief Executive Officer, Talegen Holdings, (formerly Crum & Forster Insurance Companies), we were able to reach agreement on a Superfund agenda that I believe is the only one to date which truly meets the test of meeting the priority goals of every primary Superfund stakeholder.

The plan is really straightforward:

- First, it calls for reorganizing Superfund into a program focused on public health and environmental protection.

- Second, it calls for a substantial expansion of funding for cleanup and other priorities. The additional funds would be raised primarily with increased business taxes.

- Third, cleanup funds would be re-targeted on those sites which, alone or in combination with other environmental risks in the area, pose the greatest dangers to the affected citizens. This is especially important to People of Color because many of the most dangerous sites are in our communities.

- Fourth, it calls for improved remedy selection so effectiveness drives the choices. In all cases, it insists that protection of public health must be the standard, with factors such as land use and available technology taken into account if appropriate.

- Fifth, it calls for replacing today's site-by-site liability financing at multi-party sites with an expanded fund supported primarily by larger taxes on business. This expanded fund would pay to clean up hazardous waste legally disposed of at such sites before a set cutoff date in the past, and to restore natural resources. On this, I want to be clear: EPA, members of the Washington environmental community, and others are pursuing liability reform alternatives that strike us as inadequate. We believe that fundamental liability and funding reform are inextricably linked to meeting the environmental justice agenda. In fact, I just came here from an event with EPA Administrator Browner in Cleveland at which she announced a grant to train minorities in environmental remediation. We are, of course, pleased with this grant. But it is small and isolated. The only way to really generate meaningful progress in these and other areas important to us is by replacing the site-by-site liability financing system at multi-party sites with an expanded fund supported primarily by larger taxes on business.

- Sixth, it calls for much more empowerment of local communities through greater and earlier participation in Superfund decisions, and through retraining by minority groups in the business of remediation.

- Seventh, it calls for focusing the resources of existing federal health, economic and community development programs on communities which have been disproportionately harmed by toxics.

I want to address one important point I know is of overriding interest to many Members of Congress: the size of the expanded Superfund and the sources of revenue for it.

The current program spends about $2.8-3.0 billion a year at NPL sites. About $1.3 billion of this comes from various business taxes; another $500 million comes from settlements reached at single party sites; another $1 billion comes from settlements with PRPs. According to EPA, about $2.5 billion of this money goes toward cleanup activities.

We propose a total Superfund of $3.6-4.6 billion, with about $2.4-3.0 coming from business taxes, $300-600 million coming from the states; and $300-400 million from general revenue (our proposal does not address liability at single party sites so we also assume $500 million in single party site settlements). But in sharp contrast

to today, virtually all of that money will go toward cleanup. Thus, our proposal means anywhere from a 25-50 percent increase in cleanup spending. Isn't that what this program should be all about?

Will businesses support a tax increase? I think the answer is clearly yes. Last week, witnesses from the chemical industry, the insurance industry, and the small business industry all said they supported higher taxes on business in exchange for liability relief; today, one of your witnesses, the National Food Processors Association makes a similar pledge. This is especially important. As you know, Mr. Chairman, the food industry was among the most outspoken opponents of a broad based Superfund tax in 1986. But now, recognizing how pervasive liability is, it believes that a broad based tax is the fairest and most efficient way to finance Superfund cleanup. This shows how possible, even probable, consensus over a new financing approach is.

In conclusion, Mr. Chairman, there is something for all stakeholders in our paradigm, whether their paramount goals are public health and environmental protection, prompt cleanup, lower legal costs, fairness, making "polluters pay", community participation, or ensuring sound waste management.

These and other goals can be realized, but only if we take the opportunity we have in the next year to move beyond the ideological and confrontational thinking

which has dominated Superfund. It is time to work together to create a new cooperative model for Superfund which achieves results on the ground, not in the courtrooms.

Mr. SYNAR. Thank you very much.

Let me just share with you that Chairman Conyers who serves as the chairman of this committee and Congressman Craig Washington, who serves on this committee and Energy and Commerce will be intimately involved in implementing the many suggestions and ideas and the entire eight-point program will be made a part of the record.

[The information can be found in the appendix.]

Mr. SYNAR. Let me recognize myself for 5 minutes and begin with you, Mr. Fultz.

I think we all know that the current liability provisions are strict and retroactive, which means that even if you weren't negligent or didn't have any violation of law, you are still held accountable; is that correct?

Mr. FULTZ. That is correct.

Mr. SYNAR. And the joint and several liability provisions mean that even if you were a small contributor, you are responsible for the cleanup costs.

Mr. FULTZ. That is correct. EPA will tell you that they try to use the rule of reason, but that is essentially correct.

Mr. SYNAR. What effects have those two provisions had on potentially responsible parties?

Mr. FULTZ. I believe if they have anything to do with transporting, developing, or disposing of waste, they could somehow be responsible.

Mr. SYNAR. Now, under EPA's practice, they have been focusing on large PRPs—the so-called "deep pockets." They leave it up for those few PRPs to go after potential third parties; is that correct?

Mr. FULTZ. EPA has told us that they think they are going after the real generators of the waste. In fact, they say that about 80 percent of the waste generated is by people they have gone after—people that generated that volume of waste—but that is something perhaps you should ask them, if they go after what you call deep pockets.

Mr. SYNAR. But that third-party litigation very candidly has run amuck. We have, at the Hardage/Criner site in my home State of Oklahoma, a situation in which EPA went after a pet cemetery as a PRP. What other types of horror stories are we hearing across the country?

Mr. FULTZ. We have heard instances of little leagues, very small restaurants, Elks clubs, and other small operations like this that would be affected.

Mr. SYNAR. In 1986, when we passed the reauthorization of Superfund, we tried to deal with some of this and yet they really have not used the tools that we gave them, have they?

Mr. FULTZ. No, they have not. I guess the thrust in our statement and upcoming report is that they have been really slow and somewhat ineffective in using the tools that you made available to them.

Mr. SYNAR. Now, there are 1,195 Superfund sites on the NPL list. At how many of those sites has EPA utilized the de minimis settlements that we allowed?

Mr. FULTZ. The chart on my right shows 73.

Mr. SYNAR. Seventy-three as of September 1993?

Mr. FULTZ. That is right.

Mr. SYNAR. At how many sites did EPA utilize nonbinding allocations of responsibility?

Mr. FULTZ. Five.

Mr. SYNAR. Five. What about mixed funding?

Mr. FULTZ. Sixteen.

Mr. SYNAR. What about alternative dispute resolutions?

Mr. FULTZ. Thirty-four.

Mr. SYNAR. So let's take each of these tools separately. For 7 years, EPA has had the authority to settle with de minimis parties and yet this tool has only been used at 73 sites, about 10 a year.

In fact, your testimony was that 60 percent of those settlements occurred in 1992 and 1993 fiscal year alone. Why hasn't the Agency settled with these PRPs more quickly, Mr. Fultz?

Mr. FULTZ. They just really haven't made it a priority. They have been concerned about getting cleanups under way, and I think it is a culture issue also, Mr. Chairman. The culture has been not to put the emphasis on this, and that is something that we are suggesting they need to change.

Mr. SYNAR. Are these kinds of settlements time consuming and costly?

Mr. FULTZ. EPA really doesn't have the data to show how much it does cost either in the dollars or time. That is something again they need to develop more information on.

Mr. SYNAR. I guess the natural question here is: Don't you think that it would be useful for us if EPA had that kind of information?

Mr. FULTZ. I think it would be very useful for you.

Mr. SYNAR. Because we are about to reauthorize this law and we need to know so we can make good decisions, right?

Mr. FULTZ. That is correct.

Mr. SYNAR. But that information is not available today?

Mr. FULTZ. No, it is not.

Mr. SYNAR. Why has the EPA been hesitant to use the mixed funding method?

Mr. FULTZ. There is concern that if they use it frequently, that it will be a given. And each time they go in to negotiate, they believe that it will be put on the table as knowing that EPA is going to participate in mixed funding and therefore that is the starting point.

And, frankly, we have some concerns about that also. We think it should be used prudently but certainly should be used more than what they have attempted to use.

Mr. SYNAR. So your opinion is they should use it increasingly?

Mr. FULTZ. There are places where it can be used and that is something we have been stressing over the last couple of years; EPA needs to use more of the tools made available to them.

Mr. SYNAR. We are going to hear today from CMA and EPA's National Advisory Committee for Environmental Policy and Technology and they are advocating reforming liability by instituting an allocation system and alternative dispute resolution. Now, if this is such a great idea and has it been available for 7 years, why hasn't the Agency used it?

Mr. FULTZ. It has been available. I think it goes back to what I said earlier, the incentives have not been there. The emphasis

has not been there. It is a culture issue that the Agency needs to change.

Mr. SYNAR. Do you think there are better uses for these tools?

Mr. FULTZ. Better uses?

Mr. SYNAR. By EPA?

Mr. FULTZ. Oh, yes, absolutely. We think again, as I have said in my prepared statement, we are not against making substantive changes to the legislation. We do think that EPA needs to use the tools made available. They have frankly not done a very good job of doing that.

Mr. SYNAR. Is it the opinion of the GAO, Mr. Fultz, that the statute should be changed to reduce the transaction costs associated with allocating liability?

Mr. FULTZ. One thing I think we need to find out more about is exactly how much the transaction cost really is and that is something in a review we have under way for various Members of Congress and committees. It should provide useful information to you and other committees in making that decision.

Mr. SYNAR. Mr. Sanders.

Mr. SANDERS. Thank you, Mr. Chairman. Let me just start off with Mr. Fultz.

When the chairman asked you why the EPA was not using the tools that are available to them, I think you said something to the effect that it is not within their culture or something like that. What exactly does that mean—incompetence?

Mr. FULTZ. No. They have been emphasizing getting cleanups under way, putting the emphasis on getting parties responsible, coming to the table, looking at the issue of characterizing the type of waste. I am certainly not defending it, but I am saying they have not been emphasizing the use of these other tools. They have been more concerned with getting cleanups under way.

I think they have missed an opportunity here, quite frankly, because I think if they were to use de minimis more than they have, it would alleviate some of the parties that they had to negotiate with earlier on in the process. Let them concentrate on some of the larger polluters and responsible parties and put their emphasis there.

So I think it is an opportunity lost but, again, I think that is something that they recognized. We are encouraged by their plans. That is something I would ask this committee as well as other committees to watch what they do. We will be watching their implementation of these plans and it is something that we need to keep, frankly, after them about.

Mr. SANDERS. I myself would say that your explanation is somewhat generous. I would use perhaps some other adjectives.

Dr. Chavis, as I understand it, your concern is that there are major toxic wastesites all over this country, many in minority communities, and the government has not moved rapidly on this. We have wasted an enormous amount of time doing other things.

As I understand it, what you are saying is, let's get to it, develop a broad-based business tax and let's start addressing the problems and cleaning up the waste. What ideas do you have in terms of a broad based or a business tax? What do you think would make sense?

Dr. CHAVIS. Well, in discussion with some members of the Business Roundtable about this issue, I first think that—I am not antibusiness, and I think that most business leaders want to be responsible. Under the current system—the current system inclines toward litigation, and if we could change the liability reference, it would move away from engaging in lawsuits to actually using the resources that businesses have for cleanup.

I think funding and liability are inextricably linked. To argue about funding as if it is not connected to liability or vice versa, I think, is just going to spin our wheels on this debate, and that is why the eight-point plan we have put forth has been a plan that has been endorsed by some of the major business leaders as well as insurance executives as well as those of us in the civil rights community.

Obviously, we are trying to find a win-win for all the major stakeholders. And I think it is in the interest of business, in the long term, to pay up in terms of a significant tax, in terms of getting the cleanup done and moving forward. Right now, we have had 13 years of litigation. It has not helped those businesses. It has not helped the communities that have been exposed to these hazards.

Mr. SANDERS. Let me ask, do you have any rough idea as to what you would be talking about in terms of the need to raise—what kind of revenue would we be talking about each year that we would have to raise?

Dr. CHAVIS. Yes, if you are interested, nonsite-specific funding—one second.

I wanted to make sure I gave you an accurate answer. In nonsite-specific funding, the oil tax, under the current policy, is about $550 million; chemical taxes, under current policy is about $250 million. A broad business tax, we are saying $1.350 million, which would be two times the existing formula.

Mr. SANDERS. You mean billion, I think.

Dr. CHAVIS. Well, $1.350 billion.

Mr. SANDERS. Billion, right.

Dr. CHAVIS. Or $1.350 million.

Mr. SANDERS. Which is double, OK.

Dr. CHAVIS. However you calculate it. The insurance premium would be $300 million, the State share, which is 10 percent, $300 million; Federal Government, $300 million; and site-specific funding, PRP payments at single-site sites, would be about $500 million; PRP payments for post-1986 disposing, illegal disposal, would be $80 million; and PRP recoveries for non-NPL emergency removal, about $40 million.

Totaling it all up, it is about $3.670 billion.

Mr. SANDERS. Thanks very much.

Dr. CHAVIS. And we will be glad to furnish you with this chart.

Mr. SANDERS. Thank you.

[The information can be found in the appendix.]

Mr. SYNAR. Mrs. Thurman.

Mrs. THURMAN. Mr. Fultz. The witness on our first panel related some of the costs that they had incurred in dealing with the current Superfund program. Mr. Gibbs noted that over $40 million was spent in legal and related fees to fight EPA's remedy selection.

Mr. Shea and Dr. Perrin described being pulled into the Superfund's spiderweb via third-party litigation and say they have had to pay substantially to defend themselves against other PRPs. Has GAO examined the cumulative effect of these high transaction costs on industry as a whole?

Mr. FULTZ. No, we have not. That is something we have under way right now, and that report should be coming out, I would say, in a matter of a few months. We are surveying all the major 500 companies.

Mrs. THURMAN. Would it be safe to say it will be somewhere in the billions?

Mr. FULTZ. I would hate to speculate to that degree, but I think it is going to be substantial.

Mrs. THURMAN. Has GAO been able to make any links between lengthy disputes over liability and cleanup delays?

Mr. FULTZ. We have not, although I do certainly conclude that if there are lawsuits and so forth, it does lengthen out the cleanup process and it does take longer. I think EPA has an estimate of something like 10, 12 months longer if it is involved in litigation. But I think that is something that perhaps you should get from the Agency.

Mrs. THURMAN. Opponents of the current liability system and GAO have argued the drastic consequences associated with the present system serve as a strong deterrent to irresponsible corporate environmental behavior and promote better waste handling practices among industry.

Don't you think that the numerous environmental statutes enacted over the last decade are sufficient deterrents to irresponsible corporate environmental behavior? Is it really necessary to have such a Draconian system on the books for that purpose when we all have these other laws?

Mr. FULTZ. Well, I think this hearing, as well as others I am sure that will be held during the upcoming months, will address that issue further. Certainly the actions of some companies have not been acceptable, whereas others, as we have heard here this afternoon—and I sat here and listened to those—there obviously are some areas in the legislation that need to be addressed, and I think, hopefully, that will be done.

And perhaps there is a system out there somewhere that will combine the best of the various proposals that we have already heard, or others that might be introduced, that will provide a fix that will address the majority of concerns.

Mrs. THURMAN. It seems like eliminating retroactive liability would reduce transaction costs substantially. What does GAO perceive are the biggest problems with eliminating retroactive liability in favor of an EPA-administered program if it was financed primarily by industry?

Mr. FULTZ. Well, I think we would have several questions about that, and that is not to say we are against that, but there are concerns or questions that we would like to see addressed; that is, how it would impact the speedup of the cleanups; how would you assure that responsible environmental activities are occurring by the companies; what costs to the Federal Government would occur if you eliminated that responsibility?

Mr. Synar directed much of the work that GAO did over the years on the environmental problems in the DOE nuclear weapons complex, where DOE virtually indemnified all the contractors. And, frankly, they did not do a good job of managing their environmental waste in that complex, to the extent that today we, as a Nation, are facing costs upwards of $180 billion to clean up the waste in the nuclear complex.

Mrs. THURMAN. Mr. Fultz, let me ask something. What if you did it on eliminating or allowing us to go back and clean up some of these sites, but we said to companies or industry that you have to have all of your requirements in place; whatever monitoring might have to be done, any of your audit reports, any of those kinds of things to make them eligible for any of the cleanup dollars?

Mr. FULTZ. That is a viable alternative that could be considered for sure. I would hate to say I agree or disagree. I would have to see the entire package, but that certainly is something that might get you to what you are trying to achieve.

Mrs. THURMAN. OK, thank you.

Mr. SYNAR. Mr. Mica, 5 minutes.

Mr. MICA. Thank you, Mr. Chairman.

Mr. Fultz, some questions for you. I apologize if any of this is repetitive. I had to go to the floor and missed some of your testimony, but I tried to read through it.

The 1986 SARA law: Do you see it defective in any way? Is there something we can do? I didn't see any specific legislative recommendations here. Is it just use the tools that you have already?

Mr. FULTZ. That is correct.

Mr. MICA. Is there something that needs to be adjusted by the Congress to make this more effective? I mean, this horse is being led to water and it is not drinking.

Mr. FULTZ. Well, I would say that the tools that have been made available to EPA by the 1986 legislation have not been used effectively by the Agency. They need to improve their use. They need to make better judgments about when to use them. They need to encourage the regions to use the various tools, and I think that is going to help.

Mr. MICA. "They" is who?

Mr. FULTZ. EPA.

Mr. MICA. Who within EPA? Let's get specific.

Mr. FULTZ. The people responsible for——

Mr. MICA. Who has not been doing this? Name some names.

Mr. FULTZ. I will let Mr. Donaghy.

Mr. MICA. Who did you contact that is in charge of this to get your information?

Mr. FULTZ. Who did we contact? Program people responsible in the Agency for running the program for EPA.

Mr. MICA. Who is the head of that? Who was in charge of it when you were conducting this survey?

Mr. DONAGHY. The Assistant Administrator for most of the last 4 years would have been Don Clay.

Mr. MICA. He is gone?

Mr. DONAGHY. That is right, he is gone.

Mr. MICA. And was he interviewed for this? Is the problem a Clay problem or do the new people have their act together?

Mr. FULTZ. I see improvements in the management philosophy at EPA. I believe there has been——

Mr. MICA. Is it going below that level that seems to be a problem? These people have the tools, which is the law, to do the job. They have the direction from the Congress. God knows this chairman has been on their butt for a long time. I have only been on their tailgate for a short time, but nobody seems to be listening. So I want to get specific; like who?

Are we down below that level? Now we have Clay replaced. And are they listening down there or are they going to need a 2 by 4?

Mr. FULTZ. Let me first of all say I think one of the reasons that the chairman and other Members of Congress have been able to try to reinforce the legislation that EPA has been given has been the result of several GAO reviews over the years. I want to get that on record. We have been very critical of the EPA operation of Superfund.

Mr. MICA. My question, sir, is have the people below the Administrator now gotten the message? Do you feel that you worked with some of them to finish this, because this was finished at 1 o'clock Monday for presentation today on the 8th.

Have they gotten the message or do we need to go in there? Does Carol Browner need to go downstairs and work with some of these folks and talk to them?

Mr. FULTZ. I believe that the more emphasis that the Administrator could place on this program, the better.

We will be making recommendations to the Administrator. She is bound by law to respond to congressional committees as to how she is going to respond to our recommendations.

We are going to recommend that they take action on the use of these enforcement tools. We are going to recommend that they provide resources to the regions. We are going to recommend that they provide incentive systems to the various regions. We are going to recommend that they have incentives for each of the regions to use these tools.

And, sir, there again, I say that is something that you, as a Member of Congress and other committees, need to hold their feet to the fire.

Mr. MICA. Their feet to the fire.

Mr. FULTZ. That is correct.

Mr. MICA. I don't see that in here. Are you going to do that in a separate document?

Mr. FULTZ. We will be doing that in a report to the Agency with recommendations.

Mr. MICA. When?

Mr. FULTZ. In probably a couple of months.

Mr. MICA. Can you make a copy available? A couple of months. Will you have that ready by January 31, 1994, and can you share a copy of that with the committee?

Mr. FULTZ. We can have a copy available by January 31, and we will make that——

Mr. MICA. The problem is, I have only been here 10 months, and you see a repetitive action of neglect of deadlines, neglect of paying attention to anything, whether it is law, rules, or directions.

Mr. FULTZ. You are speaking here of the Agency; EPA?

Mr. MICA. Yes, and Superfund is right up there at the top. Right up there at the top.

So I would like to see that, and let the record reflect now by the 31st—30 days has September—of January, we will have before us those recommendations. I know I will be here until November of next year. My contract is short term. But I want to make sure that we follow up on that.

No change in legislation then?

Mr. FULTZ. No, we are not saying there should or should not be changes in legislation. We will provide the information to Congress. You, as the policymakers, will make those decisions about what needs to be done.

Mr. MICA. If I may just wind up here, Mr. Chairman, please.

Mr. SYNAR. You are pretty wound up as it is.

Mr. MICA. It doesn't take much, just a few hours back in Washington.

Let me ask you, too, could the goals for settling some of these things and getting the train moving, if we move some of the emphasis to the regional level or to the State level, because many States already have duplicative agencies, could that be more effective?

Mr. FULTZ. It would be more effective.

Mr. MICA. Well, I have many more questions, but Mr. Chairman, I yield back. Thank you.

Mr. SYNAR. We will have another round.

Mr. Mica, these are the good guys. They are helping us find the problems. This is not EPA sitting here. This is GAO.

Mr. MICA. I know.

Mr. SYNAR. OK.

Mr. MICA. If they give us that document by January 31, we will have one more tool to go after them with.

Mr. SYNAR. Absolutely.

Mr. Fultz, Mr. Gibbs, from my State, told us the lenders are afraid to lend on the property located in Superfund sites, and Mr. Shea and Dr. Perrin's story we all know. Wouldn't an EPA-administered cleanup program facilitate faster cleanup of these properties?

Mr. FULTZ. It could. However, I do have to state here, Mr. Chairman, that we have seen, as you know, many problems within EPA's administration of various programs, including Superfund. Contracting for Superfund has been a problem for a number of years.

We would be guardedly optimistic that EPA could take on any more responsibility. Frankly, their record has not been very good at administering this program in a general sense, and when I look at how well they control contractor costs, when I look at how well they review and audit the contractors they have working for them, I get concerned.

That is one of the questions I would ask Members of Congress to consider when making changes to this legislation. I would be very, very careful in placing more responsibilities with EPA.

Mr. SYNAR. Thank you.

Ms. Probst, I want to use your analysis of the variety of options to get at the pros and cons of each one of these proposals. I want

to make sure, first of all, I understand what you mean by your terms.

First, speed of cleanup. How long does that take, on average? How long does it take on average to clean up a site?

Ms. PROBST. Right now, EPA is saying about 10 years from the time it is listed until the time they get the construction complete.

Mr. SYNAR. Is the current liability scheme a major reason for the delay?

Ms. PROBST. I don't think anybody knows. Everybody assumes it delays it somewhat, but, frankly, you look at the process of the remedial investigation and feasibility study, and the bureaucratic cleanup process takes forever. So it is not clear whether—liability has to delay it somewhat, but those people working with the cleanup process think it may be that it is the process that causes it to take such a long time, not liability per se.

Mr. SYNAR. Let's talk about transaction costs. How do you define the kinds of transaction costs involved in the Superfund?

Ms. PROBST. There are a couple of kinds we have talked about. One of them is obviously litigation costs, costs among parties, among PRPs and their insurers. There are also costs that are not technically litigation costs, but negotiation. Anybody negotiating a de minimis settlement or whatever, there is still cost, even though it is not legal costs. And then there are administrative costs of running the program, contracting, doing site studies.

So there are some legal related and some not—I think RAND found that 65 percent of transaction costs are legal related and the other 35 percent are not.

Mr. SYNAR. I was about to ask you about that RAND Corp. study released last week. It said 25 percent for PRPs and almost 70 percent for their insurance companies. That is about right?

Ms. PROBST. They are the only people who have any numbers.

Mr. SYNAR. Doesn't that percentage vary depending upon the type of site?

Ms. PROBST. Yes. What the first RAND study shows—and I have not looked in as much detail at the second—is that the transaction costs, not surprisingly, are the largest at big multiparty sites.

If you have a company that has owned a site for a number of years, they tend to fight over the remedy, not over who is going to pay. So the RAND data and common sense and all the lawyers who seem to know about this say the transaction costs are much higher at sites with a lot of parties.

The other thing is that costs don't have to be high for them to be very troublesome for a small business. For a small business $10,000 can be a lot of money.

Mr. SYNAR. That is exactly what the RAND study concluded when they said there is a certain amount of fixed cost and that these small companies find it almost prohibitive.

You also looked at the fairness of potential changes in the liability systems. What does that mean? Fairness to whom?

Ms. PROBST. We define fairness in three different ways. One of them is that the person or party that caused the contamination pays, one is that there is no retroactive liability, which is considered blatantly unfair. And the third definition was that parties who took similar actions are treated similarly, which is an issue that

comes up if you talk about getting rid of liability, for example, at landfills but not at some other kinds of sites.

So there were three definitions, and each of the alternatives does well against some and poorly against others. And the real problem comes in when you figure out where the trust fund money is going to come from. What is hard is that there is no way to get bankrupt parties to pay.

Mr. SYNAR. Well, that is the next question. In your testimony you say the fairest system would be to use general revenues to finance the cleanup of the sites created before Superfund was enacted, and to cover the cost of orphan shares. But you rule that approach out because of cost. Just how much would this cost?

Ms. PROBST. To do all the pre-1980 sites and orphan shares?

Mr. SYNAR. Right.

Ms. PROBST. I would say about $18 billion.

Mr. SYNAR. $18 billion?

Ms. PROBST. That is spread over 5 or 10 years. These numbers are very rough, and there are no good numbers.

Mr. SYNAR. Right. Your testimony also states that while Superfund cleanups would be expedited by changing those liability standards, they could also be expedited under the current system.

Does that mean that you agree with the GAO's findings that we have not given the current system an opportunity to work?

Ms. PROBST. I guess I would phrase it differently.

I think they have not taken the kind of radical actions to change the way the law is implemented, which they could take both on the liability and on the cleanup side.

Mr. SYNAR. Your option 2, which you talk about, is aggressive mixed funding, and that resembles what the CMA allocation or the fair share plan, where the trust fund picks up the cost of the orphan shares. But you say that that approach, which would seem to speed up cleanups, might be difficult to implement and might delay cleanups. Why is that?

Ms. PROBST. In the NACEPT process, which I have been involved in, we are all having a lot of difficulty defining what an "orphan share" is. And the concern is that—and this is a concern raised by the Department of Justice and EPA—any definition that involves each individual party proving what they did and didn't do, and when, and that they are really orphan or not orphan, could be a tremendous drag on the system.

So there is just a concern that you would have to, in effect, do an NBAR, an allocation, on every single site, and it would require a tremendous amount of data.

Mr. SYNAR. Advocates argue that that approach will not cost any more because they might be picking up the 25 percent for the transaction cost. That makes up the difference. Is that logical?

Ms. PROBST. In societal costs, yes. It is just the cost to the government that would increase, because the government—I think this is what GAO has testified—the government transactions cost would increase, so that you would need to increase the trust fund.

It may be that the PRPs are now spending their 25 percent, but that money is not now in the Federal budget, so it is a question of shifting the costs. And, the societal costs might be a lot lower

to do orphan shares, but you are shifting where those transaction costs are incurred.

Mr. SYNAR. On retroactive liability you cite some disadvantages of wiping out all of that. Doesn't elimination of all retroactivity have some real advantages over the allocation in terms of speed and reduction of the transaction cost?

Ms. PROBST. In terms of speed, as I think I have said, and GAO, we are not—I am at least not confident that EPA running this program will lead to speedier cleanups. It is not clear to me, if you get rid of retroactive liability, that leaving the government without any involvement from the private sector, it is going to lead to accelerated cleanups.

In terms of transaction costs, it depends, again, on how you define them. It will obviously cut down on litigation; there is no doubt. The question is again what GAO mentioned; the cost of government contracting. CBO, I think, is estimating that it costs the government 20 percent more to run the same cleanup as the private sector. That is in the same ballpark as the RAND numbers.

So the concern is simply that you have new kinds of transaction costs, i.e., the administrative costs of the lovely government contracting system, and you have just shifted them.

Mr. SYNAR. Now, the fresh start approach, which is advocated by Industrial Compliance, includes some "waste end" taxes. In your opinion, is that system fair and efficient in raising the funds necessary for cleanups?

Ms. PROBST. I think it is a very inefficient system in raising funds. It is a very administratively burdensome system. There is no data right now that one could use on which to levy those taxes.

Mr. SYNAR. Now, under that same approach, they have a "global budget" for cleanups. The worst sites would be cleaned up first, and the Superfund program would clean up only the sites that have been budgeted for each year. Does that approach makes sense?

Ms. PROBST. It makes sense if you are funding everything out of the Federal trust fund. To the extent that all the money is in one place, it makes sense. Again, if you have a bifurcated system of liability and trust fund, it is harder. And, frankly, EPA tends to—each region tends to have its own priorities, and all the programs, when you look at them, do not really change their regional allocations very much from year to year.

So there are a lot of other problems in terms of the Federal Government really looking at each individual site that go way beyond this program.

Mr. SYNAR. You know, let me conclude with you by asking you this question. Given what we know about the relative risk that Superfund sites pose to the general public—namely that they are not as great a risk as other environmental problems such as drinking water, is this really where today's scarce resources should be focused?

Ms. PROBST. I think there are some sites where there are very high risks to the people living right there. I would defer to my colleague from NAACP, but I think there is an issue. There are probably not as many people at risk as from the traditional air and water programs, but there are probably very large risks to a smaller number of people.

I think it is a very fair question to ask. I think we do not yet know—unfortunately, the dearth of information on the risks at these sites and what it costs to clean them up is pretty outrageous. It is possible that we are spending too much as a society on them, but again there are sites where there are real people at risk from these sites.

Mr. SYNAR. Dr. Chavis, I want to explore your testimony a little bit.

On October 14, 1993, you wrote a letter to the chairman of the Congressional Black Caucus declaring the Superfund law a "failure" which does not protect poor people, particularly people of color who live near those sites. Instead, you endorsed the eight-point plan for action, a reform that you presented to us. I would like to examine some of these points.

First, you recommend reorganizing the program into one focus, on public health and environmental protection. Why don't you think the current system does that?

Dr. CHAVIS. Well, first of all, the current system, the track record of the current system shows that at least 70 percent of the money has been spent on transactional costs, and transactional costs are defined, in large measure, by litigation, and the end result of the litigation also has not led to cleanup. This is the problem.

I think that the current system has not protected the environment. The current system has not derived public health benefit. If anything, the current system has degraded public health in those communities that are—and let me be very specific, Mr. Chairman. In some African-American and Latino and Native American and Asian Pacific communities, it is not just living in proximity to these sites, they are living in the sites.

In Columbia, MS, just for example, African-American and white, poor white, communities, they actually are living inside of a Superfund site. They have been living there since it has been around, and there has been no real, final adjudication of that, and there has been a lot of public health degradation.

I think that the current system needs to be changed, and if I had to put my finger on what is wrong with the current system, it is the retroactive liability. Because retroactive liability has increased litigation; it has increased transactional costs. And what we want to do—we are not saying that polluters should not pay, but we are saying polluters should pay in a way that gets the job cleaned up. And the current system, right now, is almost like a nonsystem. It is really not a system.

We think it is very unfair to ask communities that are living in these sites or live in proximity to these sites for 13 years to wait for another 10 years under the current system before some cleanup actually starts.

Mr. SYNAR. Let me explore some of this, because I have a site very similar to the one you described in Mississippi, in Oklahoma, in Bartlesville, where people are living literally on top of it.

Dr. CHAVIS. I am familiar with that.

Mr. SYNAR. And yet, as you heard my question to Ms. Probst, the question is becoming in this country one of the relative risk of Superfund sites as compared to other environmental risks. You advocated in your testimony today that we should increase the size

of the fund through higher taxes in order to try to clean up these sites as fast as possible.

I guess the natural question to ask you is, if there are higher environmental or significant human health risks to populations you are concerned about, shouldn't those additional moneys go to those problems first versus Superfund?

Dr. CHAVIS. Well, they are inextricably linked, Mr. Chairman. Not facilitating or expediting the cleanup is going to lead to higher health costs; it is going to lead to destabilization.

For example, in most of these communities where Superfund sites are, the presence of that site has served as an economic disincentive for the rest of the county. No business or industry will move into a county that has been identified with a lot of Superfund sites.

So on the one hand, the public health is impaired; on the other hand, the economy, the economic sectors of their community are also impaired. And that is why in our eight-point program we talk about cleanup, at the same time cleaning up in a way that gives jobs, gives community involvement, and looks after the public health; at the same time reduces the incentive to go into court.

Right now, the current Superfund has only one incentive and that is to go into court. And that is what we want to change.

Mr. SYNAR. Flesh this out a little bit for me. How does your plan focus on specific areas, on communities disproportionately harmed by toxics? How does it work?

Dr. CHAVIS. Under the program that we are proposing, Mr. Chairman, at the front end of the process, communities that are affected or live in proximity to the Superfund sites would be involved on the front end of negotiating what type of cleanup, and also to participate in the cleanup in terms of some economic incentive. Almost like a public works program.

In addition, the responsible parties—Mr. Chairman, there has been a lot of talk about PRPs, potential responsible parties, but I want to talk about AIPs, actual injured parties, and they never get talked about in this debate.

The potential responsible parties have gotten all of the—they define the parameters and they define the priority of them, and then actual injured parties are left by the wayside. And that is why I appreciate having the opportunity to come before your committee, because at the NAACP, we are representing the AIPs. And the AIPs maintain that the present system leads to litigation, leads to transactional costs. In fact, I would go so far as to say, Mr. Chairman, that the present Superfund law has injured the public health; that the present Superfund law has contributed to economic downturn in those communities where those Superfund sites have not been cleaned up.

We have an opportunity now for reauthorization, and I think this law should be reauthorized in a way that, by an act of Congress, it makes it necessary for community involvement—by an act of Congress, makes it necessary for the public health aspect to be taken into account, sir, for economic development; and to remove retroactive liability, which I will put my finger on as the No. 1 culprit, and making an incentive to go into court to resolve something we think should not be resolved in litigation.

Mr. SYNAR. Well, first of all, let me thank you for flying back from Cleveland for your testimony today, because I think it has been helpful. And I guess the best way to summarize at least this member's feeling about this, which I think you detailed in great depth today, is that we are not moving enough dirt. We are not cleaning up enough sites.

And the American public has every right to be very upset that we are literally billions of dollars down the road, and many years down the road, and yet the sites we have identified are not getting cleaned up. The public is tired of it, and we have to come up with a way to move dirt to protect the populations which are most vulnerable.

And I think your testimony clearly points to the problems of the past and the needs for the future. Thank all of you for being with us today.

Mrs. THURMAN. Mr. Chairman.

Mr. SYNAR. I am sorry, Mrs. Thurman.

Mrs. THURMAN. To add to that—and maybe, Mr. Fultz might give us an idea why—the fact it is taking us so long to clean up these sites, it is not just the health risk to the public, but it is also the additional cost, as we saw in some of the testimony where this product has actually moved from where it originally was to spaces next to it or locations next to it.

So it is not just the cost of the immediate cleanup. As long as we leave this product within this area, it continues to multiply and even be a more costly situation, I think. And I don't know how many billions of dollars we are looking at in that situation, too.

Mr. SYNAR. Thank you. We thank all of you for coming today. We appreciate it.

Our final panel today is Mr. Martin McCrory, senior attorney, public health division, Natural Resources Defense Council; Mr. Bernard Reilly, corporate counsel for DuPont Co., on behalf of the Chemical Manufacturers Association; John Spisak, president and CEO of Industrial Compliance, Golden, CO; and Ms. Karen Mogan, director of environmental affairs, National Food Processors Association.

Please come forward. Before you all sit down, as you saw from the previous two panels, we swear in all our witnesses. Do any of you have any objections to being sworn?

If not, raise your right hands.

[Witnesses sworn.]

Mr. SYNAR. Welcome. I think we have warmed them up for you. Why don't we begin with you, Mr. McCrory.

All four of your prepared testimonies will be made a part of the record. At this time, we would ask you to summarize within about 5 minutes or so.

STATEMENT OF MARTIN A. McCRORY, SENIOR ATTORNEY, PUBLIC HEALTH DIVISION, NATURAL RESOURCES DEFENSE COUNCIL, WASHINGTON, DC

Mr. MCCRORY. Good afternoon, Mr. Chairman, members of the subcommittee. It is my pleasure to come before you today to speak on issues related to Superfund liability. My name is Martin McCrory, I am the senior attorney with the Natural Resources De-

fense Council, NRDC, working on Superfund reauthorization. More specifically, I am working on revising the Superfund liability scheme.

Rather than go through a series of complaints against Superfund, I will say that NRDC has been working with all interested parties, including the environmental justice community, in an effort to analyze Superfund's liability scheme and to develop a fairer allocation system for Superfund liability.

NRDC is also working to create a system that provides expedited settlement for de minimis PRPs. Since I only have 5 minutes, instead of going through the other proposals, I want to address our problems with the public works proposal.

First of all, I would like to say that I agree with Dr. Chavis on all of his points, except the last one, which is adopting a public works scheme. Of the alternatives that are being bandied about, we are least comfortable with "public works." The scheme would eliminate strict joint and several liability, creating a massive fund to pay for no-fault cleanups at Superfund sites.

I will quickly try to list our problems with public works. The first is payment.

The first question that comes to everyone's mind when they hear about this scheme is how much will it cost and who will pay. No one really knows how much this system will cost. I have heard estimates as low as $2 or $3 billion, or figures much higher.

There is no agreement on what cutoff date should be used. Different interest groups want different cutoff dates to escape liability. We have heard several different cutoff dates, from 1976 to the date of the next Superfund reauthorization, and each date has a different cost associated with it.

Additionally, this scheme does not even take into consideration any changes in the hazardous ranking system that will result in new sites on the NPL or the new push for accelerated cleanups—which will cause more money to be spent faster, per annum—or even EPA's general estimates of the new sites coming down the pipeline that will also increase the NPL.

But I think the more important question is who pays. Do we tax the insurance industry? Do we tax municipalities? Do we tax the State? Do we tax the general taxpayer? Do we increase taxes on those industries already paying? Do we tax small business or do we just tax everyone?

Despite what you may have heard, there is absolutely no consensus on who should be taxed or how much they should pay.

We strongly oppose any effort to shift billions of dollars in liability to individual taxpayers who have absolutely no connection to a given site. We would rather work on allocation proposals that have broad-based consensus with little, if any, tax increases, rather than try to get Congress to pass a multibillion dollar tax-and-spend proposal that will not clean sites and will not lower transaction costs.

Although this proposal claims to eliminate transaction costs, it could actually result in new litigation costs. It ignores the role of the States. This proposal ignores the fact that 41 States have their own Superfund laws with retroactive, strict, joint and several liability.

Now, unless the proponents of this proposal plan on trying to specifically preempt State law, they will still have litigation in State court over these same sites under one law and in Federal court under another law.

The public works scheme ignores litigation over the cutoff dates. Of course, the parties will litigate over their eligibility for the cutoff dates—assuming that there is a cutoff date. This will require massive and extensive research and discovery to determine who sent what waste, when, and where.

It also ignores the question of who has the burden of proving the date of disposal and how will this be determined. Will there be an administrative procedure established with judicial review, or will the parties go directly to court? Either way, this could take years to resolve.

The scheme creates a massive statutory exemption, but does not set up any procedures to decide who gets the exemption and who does not. Also, the parties who have already performed cleanups and/or paid, and the parties who have signed consent decrees and committed to do cleanups will immediately file suit to recover the billions of dollars already spent or committed to date under the Superfund program.

The last problem that we have is the problem of cleanups. The public works proposal could easily lead to fewer and less protective cleanups. By creating a finite fund for cleanups, the proposal will create competition among sites based primarily upon cost and not their threat to the environment or human health.

The public works proposal would also result in pressure to choose cheaper, less protective remedies at sites so the limited appropriated funds can be spread further.

The public works program will also make cleanups hostage to annual appropriations battles, because once the money being spent on the sites becomes Federal dollars instead of private dollars, the entire hazardous waste enforcement program becomes directly susceptible to political pressures. And those communities that historically have had no political clout will be the communities that simply do not get cleaned up.

Once there is a limited amount of appropriated money to be spent, per site, per year, environmental problems in poor, ethnic, and minority neighborhoods will be ignored; and we believe that the current situation will be greatly exacerbated relative to environmental justice.

Mr. SYNAR. Thank you very much.

[The prepared statement of Mr. McCrory follows:]

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TESTIMONY OF THE

NATURAL RESOURCES DEFENSE COUNCIL

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT, ENERGY, AND NATURAL RESOURCES
COMMITTEE ON GOVERNMENT OPERATIONS
U.S. HOUSE OF REPRESENTATIVES

ON ISSUES RELEVANT TO

SUPERFUND LIABILITY

PREPARED BY:

MARTIN A. MCCRORY, J.D.
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Good morning. Mr. Chairman and members of the subcommittee, it is my pleasure and honor to come before you today to testify regarding issues related to Superfund liability. I am Martin A. McCrory, Senior Attorney with the Public Health Program of the Natural Resources Defense Council ("NRDC"), working on Superfund reauthorization. By way of further introduction, I would add that I am a former trial attorney with the United States Department of Justice's Environmental Enforcement Section; I am a former Deputy Attorney General with the State of Indiana's Environmental Division; and I am a former senior attorney with the City of Indianapolis. Therefore, I have dealt with environmental law in general, and Superfund, in particular, for the past decade on the local, state, and federal levels.

As you are no doubt aware, NRDC is a private, not-for-profit, public interest environmental organization with over 170,000 members nationwide. NRDC participated in the original authorization of the Superfund Program in 1980 as well as the Act's reauthorization in 1986, and is presently active in the Program's current reauthorization. NRDC has been involved in the implementation of the Superfund Program since its inception more than a decade ago. NRDC has provided legal and technical assistance to communities throughout the nation affected by Superfund sites. Additionally, we have actively participated in rulemakings, published reports, and worked with various environmental and governmental organizations to analyze key issues of the program. One key issue we have been analyzing is the liability scheme under the Comprehensive Environmental Response, Compensation and Liability Act, ("CERCLA"). We appreciate the opportunity to testify regarding the issues relating to Superfund liability.

NRDC has been working diligently with various environmental groups; local, state and federal organizations, industrial and small business representatives, Congressional representatives, and local/grass roots organizations (including local/grass roots environmental justice organizations). It has done this in an effort to analyze CERCLA and to develop a new liability scheme that is fairer to potentially responsible parties ("PRPs"), that protects the environment, and does not cause a drastic increase in taxes or a depletion of the Fund. NRDC is working with these various groups to develop a liability scheme that retains strict, joint and several liability; and, yet, provides an effective, efficient, and expeditious process for allocations of responsibility, mediation and dispute resolution. Moreover, the scheme we are developing would require the government to utilize its "mixed-funding" authority at sites in order to expedite settlements and cleanups. We are also working on a liability scheme that would provide expedited allocations and settlements for de minimis PRPs. We hope that this will greatly alleviate some of the problems faced by small businesses who have become entangled in Superfund 3rd party litigation.

THE NEED FOR MORE DE MINIMIS SETTLEMENTS

One of the most often heard complaints from PRPs is that the United States has shown a reluctance to utilize its de minimis settlement authority pursuant to Section 122(g) of CERCLA, 42 U.S.C. § 9622(g). According to the Congressional Budget Office, only 86 de minimis settlements had been reached through fiscal year 1992.[1] This is despite the fact that eliminating de minimis parties from a pending or prospective case helps to simplify the case by eliminating numerous minimal waste contributors from litigation and negotiations.[2] Additionally, these settlements help lower transaction costs and help EPA obtain earlier revenues to help finance response actions at the site.[3] Moreover, eliminating de minimis parties from cases at an early stage alleviates the most prevalent argument made against the Superfund program, that it is "unfair."

Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), requires the government to promptly reach a final settlement with de minimis parties whenever practicable and if it is in the public interest to do so. However, Section 122(g) only allows de minimis settlements in instances where the following conditions are met:

1. De Minimis Contributor -
   The hazardous substances at the site contributed by the party seeking de minimis status must represent a relatively minor amount and must be relatively non-toxic,[4] "or"

2. De Minimis Landowner -
   If the party is an owner of real property upon which hazardous substances are located, that party must not have conducted or permitted the generation, storage, treatment or disposal of hazardous substances at the site.[5] Additionally, the party must not have contributed to the release or threatened release of

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[1] Congressional Budget Office Testimony before the Subcommittee on Transportation and Hazardous Materials, Committee on Energy and Commerce, U.S. House of Representatives (April 21, 1993).

[2] See, General Accounting Office's Report, Superfund: A More Vigorous and Better Managed Enforcement Program is Needed (December 1989).

[3] Id.

[4] See, 42 U.S.C. § 9622(g)(1)(A)(i) and (ii).

[5] See, 42 U.S.C. § 9622(g)(1)(B)(i), (ii), and (iii).

hazardous substances at the site through action or omission.[6]

Therefore, a party qualifies as a de minimis contributor party if its contribution of hazardous substances at the site are minimal (relative to amount and toxicity). Moreover, the party qualifies as a de minimis landowner if it is a landowner and it did not engage in, allow, or contribute to the release of hazardous substances at the site.[7]

In working with the various groups within the regulated industries, it seems that an issue that everyone agrees upon is the need for the government to do more de minimis settlements (and the need to do them much faster). NRDC believes that the United States should become directly involved in the allocation process for de minimis (and non de minimis) PRPs. EPA should initiate a separate expedited allocation process for de minimis PRPs. We would suggest that de minimis PRPs be offered the opportunity to settle with the United States at their de minimis allocated shares within 180 days (6 months) after the site's listing on the National Priorities List ("NPL"). EPA should utilize its authority pursuant to Section 104(e) of CERCLA, 42 U.S.C. § 9604(e)[8] to gather information to be used in the allocation process and allow an opportunity for PRPs to provide information regarding their own liability or the liability of other PRPs who had not theretofore been named in the de minimis process. However, if this process is going to work, it should be relatively "quick and dirty." We believe that the time frame for naming other de minimis PRPs should be relatively short, for instance 60 days after a PRP's notification of its potential de minimis status.

Therefore, CERCLA should be amended so that the United States is mandated to perform quick de minimis allocations once EPA receives information from PRPs relative to the toxicity and volume of their waste.[9] However, if EPA does not have the time,

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[6] Id.

[7] I will confine the remainder of my written testimony in this section to situations involving de minimis contributors for the sake of brevity.

[8] Section 104(e) of CERCLA, 42 U.S.C. § 9604(e), among other things, grants EPA the authority to request information relating to the PRPs' generation, treatment, storage, and disposal of hazardous substances.

[9] Although Section 122(e)(3) of CERCLA, 42 U.S.C. § 9622(e)(3), currently authorizes the use of non-binding allocations of responsibility ("NBARs"), EPA has rarely utilized this

resources, or expertise to perform these allocations, the statute should require EPA to hire a neutral third party to perform the service. After the information has been gathered and the allocations are completed, EPA should be required to settle with all de minimis parties.

In the interest of fairness, EPA should be required to settle with "all" de minimis PRPs regardless of their financial wherewithal (i.e., regardless of whether they are "deep pockets.") This should not be considered a mere token gesture. After speaking with several large industrial PRPs, it is our understanding that they believe they will be able to successfully argue that they are de minimis PRPs at a significant percentage of their sites.

In the interest of fairness, de minimis settlements should also include a premium for early settlement and third party contribution protection.[10] Additionally, the settlement agreements would have to include a reopener for newly discovered evidence which shows that the PRP is not truly de minimis.

Although I would agree that "fairness" dictates a much greater utilization of de minimis settlements, the idea of "fairness" to PRPs at the various Superfund sites throughout the nation must be tempered with reason. We would not support any proposal or legislation that encourages PRPs to misrepresent their de minimis status in order to reduce their CERCLA liability. One of our greatest concerns regarding an increased use of de minimis settlements is that every PRP may simply begin claiming de minimis status. Currently, this situation occurs when a PRP discloses disposal and transportation records through its Section 104(e) responses that indicate the PRP is a de minimis party at the site. However, later, the PRP's undisclosed waste generation records and employees' testimony indicate that the PRP is anything but de minimis.

Therefore, if the EPA is going to work toward a more aggressive pursuit of de minimis settlements, it must also move toward a more aggressive pursuit of civil actions against PRPs who falsify information or omit information from their Section 104(e) responses.[11] It does no good to encourage EPA to

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authority. We agree that EPA should be required to perform these allocations.

[10] Section 122(g)(5) of CERCLA, 42 U.S.C. § 9622(g)(5), grants contribution protection to PRPs who settle with the United States.

[11] Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3), allows the United States to recover treble damages for violations of Section 104. Additionally, the United States is authorized to

increase its use of de minimis settlements if it does not have a way to ensure that its decisions on this matter are based upon sound verifiable information. Through civil enforcement actions, EPA must assure PRPs that if they violate the requirements of Section 104(e), they will be severely punished. Moreover, we believe that Section 104(e) responses should be sworn under penalties of perjury and signed by counsel or a high ranking official of the business to further assure the veracity of the evidence.

We would like to see (at least) the following things included in a liability system for de minimis PRPs:

1. An allocator would perform the de minimis mediations and allocations.
   a) The allocator can be EPA, an Administrative Law Judge ("ALJ"), or an outside firm or mediator.

2. The allocator's costs are part of the response costs associated with the site (indirect or direct).

3. The allocator will obtain information from the PRPs to help determine de minimis status.
   a) The allocator has the right to utilize §104(e) discovery authority.

4. PRPs have a set time frame to bring in other alleged PRPs.
   a) PRPs can not subsequently sue any de minimis PRP who was not brought into the system (the idea being you only get one shot).

5. There is a moratorium on all suits during this time.
   a) However, the United States retains the right to issue unilateral administrative orders ("UAOs") pursuant to §106 in case of emergency.

6. EPA must provide an estimated total response cost for the site early in the process (for instance 6 months after NPL listing) solely for de minimis PRPs. (This is so de minimis PRPs can "cash-out" at the end of the allocation process).

7. All PRPs with a certain allocated share, for example, .05-1.0 %, are to be considered de minimis and EPA must offer them a settlement at their allocated share.
   a) The de minimis PRP can immediately cash-out at its allocated share (plus a premium),
   b) The de minimis PRP can agree to pay its allocated rate at the time of the Record of Decision ("ROD"), or

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initiate a separate civil action to recover these punitive damages.

c) The de minimis PRP can opt out of the process or its allocation and be subject to joint and several liability.

8. After the allocation process, any de minimis shares that become orphaned either through bankruptcy or inability to pay would be subject to some form of mixed-funding.

a) The government would with pay all or a portion of the cost.

9. De micromis PRPs (.05 % or less) are exempted from liability.

STRICT JOINT AND SEVERAL ALLOCATION

NRDC also has been working with the regulated community, the affected communities, communities of color, and the environmental community in an effort to create a liability proposal that has a broad based consensus. NRDC has been working with all interested parties in an effort to develop a liability scheme that maintains the most important elements of the current scheme, while requiring the government to become involved in allocating responsibilities and costs at Superfund sites. NRDC believes that government must become involved in the allocation process at Superfund sites and that it must utilize more mixed funding at the sites. We also believe that these things can be done at sites while maintaining strict, joint and several liability.

Although the environmental community has been vocal in its criticism of Superfund over the past decade, we would like to point out that there are some successes and trends that we would not like to see undone. One of the most important aspects of this program that people fail to realize is that a lot of work is actually being done at sites under the current Superfund liability system. For instance, under the current system, all known immediate threats to human health and the environment have been lessened at every site on the NPL.[12] Under the current system, long-term remedies have been selected at three quarter (3/4) of the sites on the NPL.[13] Also, under the current system, the remedial design and remedial action process (RD/RA)

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[12] See, Testimony of Carol M. Browner, Administrator of EPA, before the Subcommittee on Superfund, Recycling, and Solid Waste Management, Committee on Environment and Public Works, U.S. Senate (May 12, 1993).

[13] See, Congressional Budget Office Testimony before the Subcommittee on Transportation and Hazardous Materials, Committee on Energy and Commerce, U.S. House of Representatives (April 21, 1993).

has begun at over half (1/2) the sites on the NPL.[14] Moreover, under the current system, actual remedial work has begun at well over a third (1/3) of the sites.[15] Therefore, although one constantly hears constant the criticism that the current liability system has resulted in only a few sites being "cleaned," this argument greatly distorts the facts. The facts are that through enforcement and removal actions, the United States has been able to address the imminent threats and endangerments to the public health and environment at the current NPL sites. In addition, under the current liability system, the United States and industry have actually begun long-term remedial work at 465 sites on the NPL.[16] The real issue is can we do better; of course we can and we should. But, in our efforts to make a faster more efficient Superfund system, we should not curtail the progress that has been made over the last 12 years.

There are other aspects of the current system that people often fail to realize. For instance, the United States is currently settling approximately 90 % of its cases and PRPs are agreeing to do the actual remedial work at the sites in over 70 % of cases. This is drastically up from 4 years ago when PRPs were only agreeing to do the work about 30 % of the time.[17] As a matter of fact, last year alone, under the current liability scheme, PRPs began 133 remedial design and 81 remedial actions.[18]

NRDC is currently working with all parties in interest at the Superfund sites to develop a scheme that maintains the government's current rate of settlements, provides real incentives for those who settle, provides strong disincentives for those who do not settle, maintains the government's right to recover its costs from the PRPs, maintains the government's right to have PRPs do the actual cleanup work at the sites, and provides the PRPs with a reasonable and expeditious allocation of costs and responsibilities at the site.

NRDC has also been involved in lengthy discussions with all parties in an effort to design a scheme in which the government would pay a portion of the share that is allocated to parties that are non-viable or bankrupt. This is also called the "orphan

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[14] Id.

[15] Id.

[16] Id.

[17] See, Browner testimony.

[18] See, CBO testimony.

share."[19]

NRDC believes that the following items should be included in an allocation scheme:

1. An allocator would perform the mediations and allocations.
   a) The allocator can be EPA, an ALJ, or an outside firm or mediator.

2. The allocator's costs are part of the response costs associated with the site (indirect or direct).

3. The allocator will obtain information from the PRPs to help determine status.
   a) The allocator has the right to utilize §104(e) discovery authority.

4. PRPs have a set time frame to bring in other alleged PRPs.
   a) PRPs can not subsequently sue any PRP who was not brought into the system (the idea being you only get one shot).

5. There is a moratorium on all suits during this time.
   a) However, the United States retains the right to issue unilateral administrative orders ("UAOs") pursuant to §106 in case of emergency.

6. EPA must provide an estimate total response cost for the site as soon as possible (For example, no later than 10 days after the Record of Decision ("ROD").
   a) This figure will be used to provide the PRPs with something other than a mere percentage upon which to base their settlement decision. However, if the regulated community is willing to accept a percentage, this section can be eliminated.

7. After the end of the allocation process, the PRPs have a set time to:
   a) Agree to the allocation,
   b) Agree upon and substitute their own allocation (but the allocated shares must equal 100 %), or
   c) Forego settlement and proceed through the normal litigation process (and thereby have a list of disincentives

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[19] Although most parties seem to agree that non-viable and bankrupt parties create an orphan share, there is still some disagreement on whether the term "orphan share" should be expanded to include other situations. For example, situations involving a PRP's predecessor-in-interest that is no longer in existence (i.e. should an orphan share be allocated to that predecessor and who should pay that share?)

brought to bear against them).

8. The terms of the settlement agreement would be embodied in a consent decree, properly noticed and entered in court.

(Note: Since this scheme involves voluntary settlements and not a binding allocation, the settling party does not admit fault, is not adjudged liable, and the agreement is only enforceable by other signatories to the Consent Decree. Therefore, a settling PRP can not be sued by any non-signatories on the basis of the allocation/settlement and more importantly, the settlor has the right to sue any non-settling PRPs to recover its full allocated share).

9. The Fund will pay a portion of the orphan share allocated to settling PRPs.

10. The United States retains its response action and cost recovery authorities.

11. There should be a cap on the amount of orphan share the Fund will pay in order to prevent a depletion of the Fund and/or a dramatic increase in taxes.

NRDC will continue to work with Congress, the affected communities and the regulated communities in an effort to develop a scheme that is "fair" to everyone. That is to say, we will work toward developing a liability scheme that protects the public, protects the environment, provides for reasonable allocations, and does not call for major increases in federal taxation and spending. But, we would warn Congress to be very wary of liability schemes that merely replaces transaction costs associated with litigation with transaction costs associated with administrative adjudication. Additionally, Congress should beware of any system that simply shifts the PRP's transactions costs (or other costs) to the government and taxpayers.

Along these lines, the Chemical Manufacturers Association's ("CMA") "fair share" proposal should be evaluated by Congress to determine whether the Due Process Clause of the United States Constitution requires a full-blown administrative adjudication "on the record" prior to a binding determination of liability and allocated costs. Congress should look at the CMA proposal and decide whether the creation of a binding allocation system, that determines liability, grants the right to judicial review and grants the right to reopeners, will actually lower transaction costs. On its face, this system seems to create another tier in the litigation process. It appears that it does not eliminate litigation; it merely creates more issues to litigate. It should also be determined whether enough information can be obtained during the administrative process for the Federal District Court to determine whether the Administrative Law Judge ("ALJ") acted

in an arbitrary and capricious manner in reaching his/her decision. Congress should look at the CMA proposal with an eye toward determining whether the lack of information traditionally associated with Superfund sites will cause these cases to be systematically remanded to the ALJ for further development and findings.

Congress should also determine whether this system is merely another scheme to transfer the burden of site costs and cleanups to the government. We would ask Congress to be careful in adopting any proposal that doesn't cap the orphan share. We fear that any such proposal would make the "orphan share" the "lion's share." If Congress adopts a liability scheme that by its nature creates massive orphan shares for the government (i.e., the taxpayer) to pay, then Congress has merely adopted another form of "Public Works."

PUBLIC WORKS

Of all the schemes that are being advocated today, the most disturbing is the "public works" plan. Although we have heard several variations of this scheme, the basic tenet remains the same. Under "public works," Congress would eliminate strict, joint and several liability for all wastes disposed at any site prior to January 1, 1987.

The most interesting thing about the public works proposal is that its primary creators and proponents are members of the "insurance industry." This is very curious since, as a general rule, insurance companies are not PRPs at Superfund sites. So, one of the first questions one must ask is why are insurance companies lobbying so hard for this scheme. The answer is straightforward and obvious; this is merely another attempt by the insurance industry to drastically limit or eliminate their contractual liabilities to their insured at Superfund sites

Insurance companies face multibillions of dollars in potential claims by their policy holders and they are losing about half of their claims in state courts.[20] It is only logical that they would attempt to get Congress to pass a bill that lowers their liability and passes their potential expenditures to the regulated industries, state and local governments, and the general taxpayers.

Moreover, it is very easy to understand the reason why the

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[20] See, Cleaning up the Environmental Liability Insurance Mess, Professor Kenneth S. Abraham.

insurance industry prefers the 1986 cut-off date.[21] The insurance industries prefer this cut-off date because in 1986 they changed their policies to specifically exclude pollution related coverage; this is also known as "pollution exclusion" language.[22]

Therefore, when insurance representatives claim that the purpose of this statute is to increase and expedite cleanups and to help affected communities cope with their environmental tragedies, we would ask Congress to look beyond this thin veil and realize the true strategy. The insurance industry has been quite successful in the elimination of its post-1986 liability and now it seeks to do the same with its pre-1986 liability. In essence, the insurance industry is attempting to utilize CERCLA reauthorization to pre-empt state contract law and to abrogate its contractual obligations to its corporate policyholders. This is not a sinister plot, but the motives behind this scheme are not altruistic either. The bottom line is that insurance companies want to reduce the money they may have to pay at CERCLA sites.

COST

Another question that immediately comes to mind is how much will this cost and who is going to pay. At this point in time, we have no clear answer on how much this will cost. Depending upon who you talk to, the figures can be as low as 2 - 3 billion dollars or they can be much higher. NRDC is presently awaiting EPA's official estimate of the total cost of implementing this scheme. We have asked that EPA look at the costs associated with the current rate of cleanup of the current sites on the NPL, an accelerated cleanup of current sites on the NPL, current rate of cleanup for an expanded NPL, and an accelerated rate of cleanup for an expanded NPL. Additionally, we have asked EPA to determine the cost related to the increase in bureaucracy and staff necessary for the government to implement a public works scheme.

Although these unanswered questions are very interesting, I believe the more interesting question is "who pays" (and at what

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[21] One question that should immediately come to mind is why didn't the insurance industry ask for a hazardous waste liability cut-off date of 1976, the date when the Resource Conservation and Recovery Act ("RCRA") went into effect; or a cut-off date of 1980, the date when CERCLA was first enacted. Surely people were on notice at these times that they were going to be liable for their hazardous waste activities.

[22] See, Environmental Liability Insurance Law, Professor Kenneth S. Abraham (1991).

amounts)? Despite what you hear or what you have seen, there is absolutely no consensus on this issue! Do we tax the insurance industry, do we tax municipalities, do we tax the states, do we tax the general tax payer, do we tax small business, do we increase the taxes on the industries that are already paying or do we just tax everyone? NRDC does not support this outrageous "tax and spend" proposal. We strongly oppose the shifting of billions of dollars in liability to individuals who have absolutely no connection (direct or indirect) to a given site.

Those who claim that a public works scheme is fairer have yet to convince me that it is fairer to ask a taxpayer to pay more taxes to fund a "corporate welfare" system in order to pay for the cleanup of a site of which he or she has never seen or even heard. They have yet to convince me that it is fair (or even logical) to raise everyone's taxes, create a massive Fund, give the money to the government, and then walk away, praying the government will spend the money in a way that totally eliminates the hazardous waste problems facing this Nation.

TRANSACTION COSTS

The public works proposal claims to eliminate transaction costs associated with Superfund sites, but it may just create new transaction cost or shift those costs to other parties or forums. The public works scheme envisions the creation of five (5) separate liability schemes; (1) the complete elimination of strict, joint and several liability for all disposals that occurred prior to January 1, 1987; (2) the creation of some form of "proportional liability/mixed funding/settlement scheme, as yet undefined, for all disposals that occurred after January 1, 1987 (with the following exceptions); (3) the elimination of all liability for all waste disposed of at municipal and co-disposal landfills prior to 1993; (4) the retention of strict, joint and several liability at all sites with only one PRP; and (5) the retention of strict, joint and several liability for willful violations. Even a cursory reading of this scheme shows a drastic increase in complexity. How can the creation of five different liability schemes, with five different evidentiary scenarios (which can easily overlap), possibly lower transaction costs?

This scheme is a lawyers's dream and a PRP's nightmare. Certainly the parties will litigate over their eligibility for the given cut-off dates in order to limit their liability at the sites. Parties who do not meet the cut-off dates at a given site will litigate against parties who claim they do. This will require massive and extensive discovery to determine who sent what waste where and when. We can also expect the United States to litigate against those claiming a pre-1987 disposal unless there was clear evidence of the disposal date. This leads to another unanswered question; who has the burden of proving or

disproving the date of disposal at a given site? Moreover, will this decision initially be made through an administrative adjudication or will it be made in federal district court? Either way, it will take years to resolve the ensuing litigation.

The scheme creates a new massive statutory exemption but does not set up a procedure to administer who gets the exemption and who doesn't. Regardless of the process that is used to determine who meets the cut-off date, under this system the party with the most money, resources, time, and attorneys still will be the most successful.

This scheme also ignores the fact that there are 41 states with their own CERCLA and RCRA[23] statutes, which utilize retroactive strict, joint, and several liability schemes to govern the handling of hazardous waste in those states. Therefore, unless the proponents of this scheme are contemplating a pre-emption of state law, they may actually end up litigating in federal court over these sites under one law and in state court under another.

The scheme fails to address the potential litigation that may be brought by those parties who have already performed work at the sites. Additionally, it is not clear how this scheme will deal with those who have already committed to doing work at the site by signing Consent Decrees which were noticed (in the Federal Register) and entered into Federal District Court. It is quite unclear how this scheme will address the lawsuits that will be immediately filed by PRPs to recover the billions of dollars already spent or committed to date under the Superfund Program.

CLEANUPS

The public works proposal could easily lead to fewer and less protective cleanups. By creating a finite fund for cleanups, this proposal will create competition among sites based primarily upon cost, instead of potential threat to human health or the environment. Additionally, this proposal will result in pressure for the government to choose cheaper, less protective remedies at sites so the limited appropriated funds can be spread further.

Once the money being spent on sites becomes "federal dollars" instead of "private dollars," it will immediately become

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[23] This proposal completely ignores the recent 10th Circuit case of United States v. State of Colorado, No. 91-1360, slip op. (10th Cir. April 6, 1993), in which the Court held that an on-going CERCLA clean-up doesn't prohibit the state from bringing a RCRA closure action at the same site.

subject to annual appropriations battles. Site cleanups will be held hostage while appropriations committees determine how much money should be spent out of the Public Works Fund.

This scheme could easily lead to "pork-barrel" cleanups. We believe that all CERCLA cleanups would become directly susceptible to political pressures. Whether a response action is taken at a site and how much money is spent will be determined by the make-up of Congress and by who is in the White House. This will directly affect communities of color and poorer communities. Since, historically, these communities have been disenfranchised and have had little political clout, it is easy for one to see how this system could omit them. Once there is a limited amount of federally appropriated money to be spent on the sites, environmental problems in poorer, ethnic and minority communities will be simply ignored.

The public works scheme attempts to create a system that only deals with sites currently on the NPL. However, the environmental community, industry, and the United States have been working with communities of color, poorer communities, and rural communities in an attempt to change the hazardous ranking system in order to actually increase the number of sites on the NPL to include more of these affected communities. Under the public works scheme, these sites may simply become political throw-aways because they will be directly linked to increased taxation and appropriation.

The public works scheme also does not address who will do the work at the sites. Currently, PRPs are doing the majority of the cleanups at Superfund sites. If the United States takes over the cleanup operations at these sites, we can expect the associated costs to rise dramatically. The General Accounting Office ("GAO") testified in June before the Senate that a public works program would require the federal government to vastly expand its staff to run such a program.

Not only have these costs not been taken into consideration, but the proponents of this scheme have not considered how this new bureaucracy would affect cleanups. Clearly, the proposal would greatly multiply the potential for waste, fraud, and abuse by the highly criticized government cleanup contractors. GAO and the EPA Inspector General have both testified to their concern over the conversion of private-sector cleanups to a public works program implemented by the poorly managed cleanup contractors. We would like to think that Congress would take these concerns seriously.

Finally, the proponents of the public works scheme have not addressed the issue of voluntary cleanups and pollution prevention. There is currently a powerful and continuing incentive for corporations to engage in voluntary cleanups and to

avoid polluting behavior. Certainly, companies will have no incentive to voluntarily clean sites if they have no potential liability at sites. Also, the ideas of waste minimization, environmental auditing, and pollution prevention become meaningless if corporations believe that they will be able to negotiate a statutory exemption for their actions. The lesson of public works will be that instead of voluntarily cleaning up one's site and limiting one's polluting behavior, all one has to do to eliminate one's liability is to call the law unfair and/or costly. The lesson that public works seeks to teach us is that it is foolish to spend a dime on pollution prevention, voluntary cleanups, or even innovative technologies because it may be more cost efficient to simply lobby for a massive statutory exemption and let someone else pay the bill.

One of the great successes of Superfund is that it has moved the problems and concerns relating to waste management out of the hands of the shift supervisor and into the hands of the plant manager. Superfund and environmental hazardous waste liability have come of age; they have been firmly implanted in the minds of corporate CEOs and are the topics of conversation in boardrooms across the Nation. We strongly oppose any efforts to relegate CERCLA to less than secondary status or dump the problem on the federal government and the taxpayers. NRDC will continue to work with Congress and all interested parties to develop an equitable liability system that does not destroy the progress already made.

C O N C L U S I O N

As this testimony indicates, issues concerning Superfund liability can be very complex and highly contentious. The problem is exacerbated by a lack of information and data to properly analyze the effect of proposed changes to the liability system strategy.

As we move toward Superfund reauthorization, we must move beyond demagoguery and begin working together to develop "realistic" solutions to address the environmental problems facing this Country. Quite frankly, I will not believe that the Nation is willing to saddle its future generation with a massive environmental debt to match the massive economic debt we have already left as our legacy. On the contrary, I believe that if we take a measured and reasoned approach to these issues, we will be able to resolve these issues in a relatively fair yet, environmentally sound fashion. Having attended most of the Senate and House hearings relating to Superfund reauthorization and having met with members of Congress and the Congressional Staff, I would like to commend you all for your effort towards resolving these very difficult issues.

Hopefully, today's hearing will facilitate further dialogue

on the issues relating to the Superfund liability scheme. My environmental colleagues and I stand willing to work with you toward a resolution of these issues. Again, thank you very much for this opportunity to testify. I look forward to answering the Subcommittee's questions and working with you and your staff during your deliberations.

Mr. SYNAR. Mr. Reilly.

STATEMENT OF BERNARD J. REILLY, CORPORATE COUNSEL, DUPONT CO., ON BEHALF OF THE CHEMICAL MANUFACTURERS ASSOCIATION, WASHINGTON, DC

Mr. REILLY. Yes, sir. Good afternoon, Mr. Chairman and members of the subcommittee. My name is Bernie Reilly. I am corporate counsel for DuPont. I am pleased to be here to testify on behalf of the Chemical Manufacturers Association.

CMA and its member companies, including DuPont, have been working with EPA to try to make Superfund work since the program was created in 1980. We now have 13 years of firsthand experience with all of Superfund's problems, including those created by the law's joint and several liability standard.

Last December, at his economic conference in Little Rock, then President-elect Clinton said he was appalled by the paralysis of the Superfund program. President Clinton also said something else that day, something we in the chemical industry took to heart. He said that all of us are duty bound to do a much better job of cleaning up contaminated wastesites.

The President was right, we are duty bound to make Superfund work. That is why we are here today—not to play the blame game, not to complain about the problems in the Superfund program; we are here to present solutions for putting Superfund back on track. We believe our plan answers President Clinton's call to make Superfund work. We also believe it addresses Vice President Gore's effort to reinvent government.

Our proposal is simple, straightforward, and gets to the heart of the liability system as we see it. We call our proposal the fair share liability system. Our fair share system determines the party's liability for a Superfund cleanup on a proportional basis. That means that each party pays for what it contributed toward contaminating a site.

Mr. Chairman, we believe the fair share liability follows the principles for Superfund reform already outlined by President Clinton, Administrator Browner, and others. First and foremost, the fair share scheme would keep the "polluter pays" principle intact.

Next, fair share would make the government work better. It would force EPA to administer the Superfund program more efficiently and effectively. It also would substantially speed the pace of cleanups and lower transaction costs.

In addition, our fair share proposal would apportion liability based largely on the well-known Gore factors developed by the Vice President back in 1980.

Moreover, Fair Share is not a budget buster. We believe demands in the trust fund because of orphan share payments would be offset by reduced enforcement needs, remedy selection reforms, and the like. If it can be shown that there is a need for increased funding, however, CMA strongly believes the increase must be financed by a broad-based funding mechanism like the existing Superfund corporate environmental tax.

Our fair share proposal would replace the current joint and several standard that has set up a chain of lawsuits and that has led to the meltdown of the Superfund program. Our fair share system

would shut down the chain reaction and break the cycle of litigation.

In our fair share proposal, the arbiter would consider the facts, weigh the evidence, and assign responsibility in a streamlined, flexible process. The arbiter's decision would be binding and typically take no more than 18 months to be issued. Small parties, like de minimis and de micromis parties, could be settled much earlier.

Our proposal permits appeals to the arbiter's decision, but the standard of review is notoriously tough. An allocation would not be overturned unless it was arbitrary and capricious.

Further, contribution actions among the parties and against each other would be prohibited. Under our system, the trust fund would pay for the shares of the parties that cannot be identified, or are defunct, or insolvent, or that are bankrupt—the so-called "orphan shares."

To assure the trust fund does not pay more than its fare share, our proposal calls for EPA to appoint a guardian to represent the fund in the allocation process and to argue for as small a share for the orphan as is possible.

One last point. Although our proposal would eliminate joint and several, EPA would retain authority to order one or more of the parties to do the work at the site, just like it does now under section 106 of this law.

Fixing the liability standard alone will not correct all that is wrong with Superfund, but will go a long way toward getting the program back on track. Coupled with a meaningful reform of remedy selection, fair share can mean a fresh start for the program.

Thank you, Mr. Chairman. I am happy to answer questions.

[The prepared statement of Mr. Reilly follows:]

CHEMICAL
MANUFACTURERS
ASSOCIATION

STATEMENT

OF

BERNARD J. REILLY

CORPORATE COUNSEL
DUPONT COMPANY

ON BEHALF OF THE

CHEMICAL MANUFACTURERS ASSOCIATION

BEFORE THE

GOVERNMENT OPERATIONS COMMITTEE
SUBCOMMITTEE ON ENVIRONMENT, ENERGY AND NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ON

SUPERFUND CLEANUP LIABILITY

NOVEMBER 8, 1993

2501 M Street, NW 202-887-1100
Washington, D.C. 20037 Telex 89617 (CMA WSH)

Good afternoon Mr. Chairman and Members of the Subcommittee. My name is Bernie Reilly and I'm Corporate Counsel for Du Pont. I'm pleased to be here today to testify on behalf of the Chemical Manufacturers Association, or CMA.

CMA and its member companies, including Du Pont, have been working with EPA to try to make Superfund work since the program was created in 1980. We now have 13 years of first-hand experience with all of Superfund's problems, including those created by the law's joint and several liability standard.

Last December, at his economic conference in Little Rock, then President-elect Clinton said he was "appalled by the paralysis" of the Superfund program and "by the fact that the money's being blown." President Clinton also said something else that day, something we in the chemical industry took to heart. He said that all of us are "duty bound to do a much better job" of cleaning up contaminated waste sites.

The President was right. We are duty bound to make Superfund work. That's why we're here today -- not to play the blame game, not to complain about the problems with the Superfund program. We're here to present solutions for putting Superfund back on track. We believe our plan answers President's Clinton call to make Superfund work. We also believe it addresses Vice President Gore's efforts to reinvent government.

Our proposal is simple, straightforward, and gets to the heart of the liability problem as we see it. We call our proposal the Fair Share Liability System. Our Fair Share system determines a party's liability for a Superfund cleanup on a proportional basis. That means each party pays for what it contributed towards contaminating a site. Moreover, Fair Share is not a budget buster. We believe demands on the Trust Fund because of orphan share payments should be offset by reduced enforcement needs, remedy selection reforms, and the like. If it can be shown shown there is a need for increased funding, however, CMA strongly believes the increase must be financed by a broad-based funding mechanism such as the Corporate Environmental Tax.

Our Fair Share proposal would replace the current joint and several liability standard. Joint and several liability makes it possible for EPA to sue a few parties for the cost of cleanup and to place the burden on them to sue the other parties at the site to collect their share of cleanup costs. The joint and several standard gives EPA no incentive at all to ride herd on spending and has created an environment that has spawned many cases of waste, fraud, and abuse. Joint and several has set off a chain reaction of lawsuits that has led to the meltdown of the Superfund program.

Our Fair Share system would shut down the chain reaction and break the cycle of litigation. Under the proposal, EPA would assemble information about a site, identify the potentially responsible parties, and then file an administrative petition to initiate a Binding

Allocation of Responsibility, or BAR. An impartial arbiter, in this case an Administrative Law Judge, would be assigned to allocate responsibility for paying the cleanup costs. All the while, the remediation process would move forward independently, on a separate track and independent of the liability system -- unlike the current program where the cleanup decisions are constantly being pulled down into the joint and several quagmire.

In our Fair Share proposal, the arbiter would consider the facts, weigh the evidence, and assign responsibility in a streamlined, flexible process designed to reach "rough justice" rather than perfection. The arbiter would have broad information-gathering powers, parties would be required to turn over any information they have about a site or face severe sanctions, and EPA would retain the strong civil and criminal enforcement authority it needs to make the process work.

The arbiter's decision would be binding and typically would take no more than 18 months to be issued. "De micromis" parties could be cashed out even sooner, possibly as early as six months after the BAR begins, and de minimis parties could be cashed out at the end of the BAR. Our proposal permits appeals of the arbiter's decision, but the standard of review is notoriously tough -- an allocation couldn't be overturned unless it was "arbitrary and capricious." To further discourage frivolous suits, losing parties would have to pay the government's legal costs. Beyond this, litigation, specifically the third-party contribution actions parties are now bringing against each other, would be prohibited.

Under our Fair Share system, the Trust Fund would pay for the shares of parties who cannot be identified, or are defunct, insolvent or bankrupt -- the so-called "orphan shares." To assure the Trust Fund doesn't pay more than its fair share, our proposal calls for EPA to appoint a "Guardian" to represent the Fund in the BAR process and to argue for as small an orphan share as is appropriate.

If parties wanted to opt out of this BAR process up front -- or at any time before a BAR is issued -- our proposal would allow this. To do so, parties would have to negotiate their own allocation of 100 percent of the remediation costs. This allocation could include monies from the Trust Fund if EPA agreed to such a "mixed funding" arrangement. Of course, third-party contribution actions would still be prohibited even in the case of such a "voluntary" BAR.

One last point deserves mentioning. Although our proposal would eliminate joint and several liability, EPA would still retain authority to order one or more parties to conduct a removal or remedial action much like the Agency now does under Section 106 of the law. This would allow for emergency removals that cannot wait for allocations of liability to be made. It would also allow for later long-term remediation activities where parties have not stepped forward to do the cleanup. The difference between current practice and our proposal is that under Fair Share liability the parties targeted by the orders

would be reimbursed for any costs incurred beyond their rightful share.

Mr. Chairman, we believe Fair Share liability follows the principles for Superfund reform already outlined by President Clinton, Administrator Browner, and others. First and foremost, the Fair Share scheme would keep the "Polluter Pays" Principle intact. Next, Fair Share would make government work better. It would force EPA to administer the Superfund program more efficiently, more effectively, and more equitably. It would also substantially speed the pace of cleanups and lower transaction costs. In addition, our Fair Share proposal would apportion liability based largely on the well-known "Gore Factors" developed by Vice President Al Gore back in 1980 when Superfund first became law and the Vice President was a member of the House of Representatives.

Fixing the liability standard alone will not correct all that's wrong with Superfund but will go a long ways to getting the program back on track. Coupled with a meaningful reform of the remedy selection process, Fair Share can mean a fresh start for the program.

Thank you, Mr. Chairman, and I'll be happy to answer any questions.

Chemical Manufacturers Association's Superfund Liability Reform Plan

KEY FEATURES OF "FAIR SHARE"

- Polluter Pays
- Speeds Cleanups
- Reduces "Transaction" Costs (Money to Lawyers and Consultants)
- Independent Administrative Law Judges Determine Responsibility
- Allocations Are Binding; Breaks Litigation Cycle
- Fair Share is Based on "Gore Factors"
- Trust Fund Pays for "Orphan Shares"
- Guardian Protects Against Orphan Share Abuses

A "FAIR SHARE" LIABILITY SYSTEM FOR SUPERFUND

A workable proposal to accelerate Superfund proceedings and reduce transaction costs by apportioning liability among PRPs so as to provide "rough justice" at NPL sites.

CHEMICAL MANUFACTURERS ASSOCIATION

August 17, 1993

A "FAIR SHARE" LIABILITY SYSTEM FOR SUPERFUND

The Superfund liability system is urgently in need of reform. The current system for determining who is liable, and for allocating costs among the liable parties, takes much too long and costs far too much, even when no litigation is involved. A growing number of cases do end up in court, and those cases take even longer and cost even more. The result is a staggering waste of resources for all involved.

Fortunately, the problems with the current liability system can be solved in a way that benefits all Superfund stakeholders. What is needed is a system that quickly and efficiently determines the fair share of each Potentially Responsible Party (PRP) without the need for litigation. These shares would be determined at the same time that EPA selects the appropriate cleanup plan for the site. Each PRP would then receive an annual invoice for its fair share of cleanup costs as those costs are actually incurred. For "orphan" PRPs, i.e., those PRPs that are unidentifiable, no longer in existence, or insolvent, the Superfund would pay their fair shares of liability.

THE BENEFITS OF REFORM

The "fair share" liability system described in this paper offers substantial benefits, including:

1. **Expedited determination of liability.** All stakeholders at NPL sites would know early in the process exactly who is liable for cleanup costs and exactly how those costs will be allocated among the liable parties.
2. **Litigation minimized or eliminated.** At most NPL sites, there would be no incentive for EPA or the PRPs to resort to litigation.
3. **Greatly reduced transaction costs.** Because allocation occurs in a streamlined administrative proceeding, typically within an 18-month period, transaction costs would be minimized.
4. **Enhanced fairness.** PRPs would no longer be compelled to pay for more than their fair share of the problem at a Superfund site.
5. **Improved EPA decision making.** Because the Superfund would pay for the "orphan" share at each NPL site, EPA would now have a direct financial stake in its cleanup decisions. This should tend to minimize "gold-plated" remedies and wasteful spending.

The remainder of this paper provides an overview and summary of the proposed "fair share" liability system for Superfund. Attached to this paper is a longer and more detailed description of the "fair share" proposal.

BASIC CONCEPTS

The proposed "fair share" liability system includes a number of basic concepts that are central to its intended operation. They are as follows:

A. **Liability at NPL sites limited to "fair share."** The current system of joint and several liability under section 107 of CERCLA would be reformed so that PRPs at National Priority List sites would generally pay only their fair shares of response costs, as determined by independent Administrative Law Judges ("ALJs"). Liability would still be strict and **retroactive, but it would no longer be joint and several. The Superfund would pay the shares of any "orphan" PRPs, i.e., unidentifiable PRPs, PRPs that are no longer in existence, or PRPs that are insolvent. EPA would be encouraged to pursue these "orphans" whenever feasible, e.g., in bankruptcy proceedings, to recover monies paid from the Superfund.**

One important exception to this "fair share" concept is the issuance of unilateral administrative orders under section 106 of CERCLA to compel performance of immediate removal actions at NPL sites, where swift action may be essential. In such emergency situations, EPA would retain the ability to impose joint and several liability on an interim basis, in order to enforce the administrative order, but such liability would be subject to eventual reallocation in accordance with the "fair share" system described in this paper.

B. **Moratorium on cost recovery litigation at NPL sites**. In order to reduce transaction costs, no cost recovery action, governmental enforcement action, or contribution action could be filed at any NPL site until 90 days after issuance of the Binding Allocation of Responsibility ("BAR"). Special transition rules for pending litigation are described in the attached paper.

C. **Early Binding Allocation of Responsibility ("BAR")**. In arriving at a Binding Allocation of Responsibility, or "BAR," that determines the "fair share" of each PRP, the ALJ would consider (1) the so-called "Gore factors," including the volume and toxicity of the hazardous substances, the degree of care exercised, and the degree of cooperation with governmental personnel, (2) any other equitable factors that the ALJ determines are appropriate, and (3) the weight of the evidence regarding liability. The BAR decision would be issued at about the same time as EPA's first Record of Decision at the site, but any delay in the BAR proceeding would not delay any response actions at the site.

D. **Development of factual record for BAR**. EPA (or the state agency) would be required to conduct a thorough PRP search early in the process and then issue early CERCLA § 104(e) information requests to all known PRPs in order to develop the initial factual record for the BAR. This factual record would then be supplemented as the PRPs submit additional information to the ALJ, including the names of additional PRPs that EPA may have overlooked. Strict provisions regarding duty of inquiry, certification of information, and the like would insure that all pertinent information will be disclosed to the ALJ. Limited discovery by the PRPs would also be available in the ALJ's discretion.

E. **Protection of the Superfund**. EPA would appoint a legal representative, to be known as the "Guardian of the Fund," to participate in the BAR proceeding. The Guardian would help ensure that the size of the "orphan" share reflects the available evidence and is not excessive.

F. **Finality of the BAR**. Subject only to limited judicial review, the BAR would be a final allocation of all recoverable response costs incurred at the site. (A limited opportunity to reopen the BAR after 5 years could be triggered only under exceptional circumstances, and even then, the revised BAR would apply only to future costs not yet incurred.) Thus, contribution actions would be virtually eliminated.

G. **Judicial Review of the BAR**. Any challenge to the BAR would be filed in federal district court. Unless the court found that the share allocated to the challenging party was "arbitrary and capricious," or that the challenging party was not liable as a matter of law, the unsuccessful challenger would pay all the attorney's fees incurred in defending the challenge. If the challenge was successful, then the "shortfall" between the share allocated in the BAR and the share adopted by the court would be paid by the Superfund, not by the other PRPs.

H. **Simple and Swift Enforcement of BAR**. As response costs are incurred, the party performing the work (either EPA or the PRPs) would send invoices to each PRP (or, in the case of an "orphan" PRP, to the Superfund) for its proportional share of those costs, as set forth in the BAR. Subject only to limited challenge on the ground of "NCP inconsistency" (as under current law), the PRP receiving the invoice would be obligated to pay promptly or else face substantial sanctions.

CONCLUSION

In sum, many of the problems associated with the current Superfund liability system can be eliminated through a system that focuses on holding each party responsible for its "fair share" of the problem. The proposal described here, and set forth in greater detail in the attached paper, offers substantial benefits for all stakeholders in the Superfund program.

A "FAIR SHARE" LIABILITY SYSTEM FOR SUPERFUND

A workable proposal to accelerate Superfund proceedings and reduce transaction costs by apportioning liability among PRPs so as to provide "rough justice" at NPL sites.

CHEMICAL MANUFACTURERS ASSOCIATION

August 17, 1993

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A "FAIR SHARE" LIABILITY SYSTEM FOR SUPERFUND

I. BASIC CONCEPTS

A. **Current standard and scope of Superfund liability generally retained, except as noted in paragraph I-B below.** No change to current interpretation of CERCLA § 107(a) regarding:

(1) strict liability,
(2) retroactive liability,
(3) which response costs are recoverable (except with regard to challenges based on "NCP consistency," as set out in Paragraphs IV-F and IV-G below), or
(4) natural resource damages.

No change to current status of **municipalities** and **small businesses** as liable parties under section 107. These issues will be addressed elsewhere.

B. **Joint and several liability reformed so that PRPs at NPL sites pay only their fair shares, as determined by independent Administrative Law Judges ("ALJs"). Orphan share paid by the Superfund, but this does not trigger any government procurement restrictions at sites where PRPs are performing response actions. EPA remains free to pursue "orphans," e.g., in bankruptcy proceedings, to recover monies paid from the Superfund.**

[**Exception:** unilateral administrative orders issued by EPA under section 106 to compel performance of immediate removal actions at NPL sites, where swift action may be essential. In such emergency situations the liability may be joint and several on an interim basis, subject to future reallocation in the BAR process.]

C. **Criteria for apportionment of liability among PRPs. The ALJ shall consider and may use (1) the "Gore factors," (2) such other equitable factors as the ALJ determines are appropriate, and (3) the weight of the evidence.**

The "Gore Amendment," passed by the House on September 23, 1980, but never enacted into law, listed six factors for the courts to use in apportioning liability:

1. The ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous substance can be distinguished;
2. The amount of hazardous substance involved;
3. The degree of toxicity of the hazardous substance involved;

4. The degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous substance;
5. The degree of care exercised by the parties with respect to the hazardous substance [waste] concerned, taking into account the characteristics of such hazardous substance; and
6. The degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

126 Cong. Rec. H9461 (daily ed. Sept. 23, 1980)

In addition to considering the Gore factors, the ALJ should apportion liability based on any other equitable factors that he deems appropriate. (See CERCLA § 113(f)(1)). For example, ownership and/or operation of the site are very important factors in applying those criteria. However, "ability to pay" is not a permissible consideration. Finally, the weight of the evidence of both the liability and proportionate share of each PRP may be taken into account in the allocation.

D. **Binding Allocation of Responsibility ("BAR")** to be performed for each NPL site by an ALJ within EPA.

E. **Development of initial factual record for BAR.** EPA or state agency required to conduct thorough PRP search and issue early § 104(e) information requests to all known PRPs to develop initial factual record for the BAR to proceed. Private parties performing site studies have limited information-gathering power outside of litigation, and so they need only submit all available information regarding identity and liability of PRPs.

F. **Moratorium on cost recovery litigation at NPL sites prior to completion of BAR.** No section 107 cost recovery action, section 106 judicial action, or section 113 contribution action shall be initiated with respect to any NPL site until 90 days after issuance of the BAR for that site.

G. **Finality of BAR.** BAR subject to limited judicial review as described in Paragraph IV-B below. BAR is final for all recoverable costs incurred at site, subject to limited opportunity to reopen after 5 years to consider changed circumstances and reapportion future costs only, as described in Paragraph IV-D below.

II. OVERVIEW OF THE BAR PROCESS

A. **When initiated.**

1. **Federal or state lead site:** At a federal- or state-lead site, the governmental entity must initiate the BAR at the earliest possible time, and no later than within 30 days of initiating the RI/FS process. The governmental entity cannot pursue a section 107 cost recovery action or a section 106 action (other than to enforce a section 106 order by compelling performance of a removal action) against any PRP at a site until the final BAR is issued by the ALJ.
2. **PRP-Lead site:** At a site where no federal or state cleanup or enforcement action is pending or imminent, but where private parties wish to perform response actions and obtain an allocation of responsibility, they may initiate the BAR. All private party cost recovery actions and contribution actions (under federal or state law) are prohibited until the BAR is issued by the ALJ.

B. **How initiated.** The BAR is initiated by the filing of a petition with the Office of the Administrative Law Judges of the EPA. In order to provide an initial factual record for the conduct of a BAR, the federal or state agency or private party overseeing the site must conduct a PRP search in accordance with the following minimum requirements. EPA or state agency required to conduct thorough PRP search and issue early § 104(e) information requests to all known PRPs prior to initiating BAR process. Private parties performing site studies have limited information-gathering power outside of litigation, and so they need only collect all reasonably available information regarding identity and liability of PRPs before initiating the BAR process.

C. **Information-Gathering Powers.** ALJs shall have broad subpoena power to collect information and may impose sanctions on parties that fail to comply.

D. **Who participates.** All PRPs, including governmental entities, are subject to the BAR and required to participate in the BAR process to the extent described in Paragraph III-L below.

E. **Who pays the "orphan" share.** The Superfund shall pay the "orphan share" as determined by the ALJ in the BAR. EPA shall make diligent efforts to collect from the "orphans" at each site as much of their proportionate shares as it can. If an apparently viable PRP is later determined to be unable to pay, despite diligent enforcement and collection efforts by EPA, its share may be added to the orphan share to be paid by Superfund.

F. **Who protects the Superfund.** EPA appoints a person to serve as the "Guardian of the Superfund" to participate in the BAR so as to protect against excessive "orphan" share. Any failure by EPA to appoint a Guardian in a timely manner shall not delay the progress of the BAR.

G. **First step of BAR process**: identify all PRPs at the site. (The specific sequence of events in this part of the process are identified below.)

H. **Second step of BAR process:** (1) determine which PRPs are actually Liable Parties ("LPs") and (2) apportion liability among these LPs. (The specific sequence of events in this part of the process are identified below.)

1. PRPs may not be LPs for various reasons, e.g., (a) § 107(b) defenses, (b) petroleum exclusion, (c) insufficient evidence, or (d) party not liable as corporate parent or successor to an LP.
2. The two elements (determination of LP status and apportionment) are combined here so that ALJ is permitted (but not required) to apportion liability based in part on the weight of the evidence as to each PRP's status as an LP.

I. **Third step of BAR process**: determine which LPs are defunct, bankrupt, missing, or insolvent and assign their proportionate liability to the "orphan" share.

J. **Fourth step of BAR process:** issue the BAR. The ALJ is also required to issue a written decision explaining the rationale for the BAR.

K. **Timing of BAR process.** The BAR should be issued within 18 months, but the ALJ may extend this deadline up to 6 additional months for good cause.

L. **Effect of BAR.** The BAR is final and conclusive with respect to all recoverable response costs, subject only to (1) limited judicial review as specified in paragraph IV-B below and/or (2) periodic "New-BARs" at five-year intervals as specified in paragraph IV-C below.

M. **EPA to pursue "orphans."** Once the "orphan" share has been determined in the BAR, EPA shall make every effort to recover that share from the various parties determined to be defunct, bankrupt, missing, or insolvent. These efforts include filing claims in bankruptcy proceedings.

III. DETAILED BAR PROCEDURES

A. **Petition to initiate the BAR.** The petition to initiate the BAR shall (1) identify the petitioner, (2) identify the site, (3) provide a brief history of the site and describe its current status, (4) provide the name and address of each PRP known to the petitioner, and (5) include all information reasonably available to the petitioner regarding the nexus between each PRP and the site, based on the information-gathering described in Paragraph II-B above. The petition may also include a list of proposed questions and document requests that the petitioner believes should be included in the ALJ's first information request. It may also include a list of legal and technical issues that the petitioner believes may be raised in the BAR. The petition shall be filed with the ALJ

Hearing Clerk and a copy shall be served on EPA, the state, and each PRP named in the petition.

B. Appointment of Guardian for the Superfund. Within 10 days of receipt of the petition, EPA shall notify the Hearing Clerk of the name and address of the individual person designated as the Guardian for the Superfund. If EPA is the petitioner, the Guardian shall be named in EPA's original petition. The Guardian shall be responsible for representing the federal government with regard to the size of the "orphan" share, if any, to be paid by the Superfund.

C. Initial Statements. Within 30 days after receipt of the petition, the Guardian for the Superfund and any named PRP may file an initial statement setting forth (1) any defenses to liability, any equitable considerations pertaining to its potential liability, (3) any additional facts and issues relevant to the BAR, or (4) any proposed questions and document requests that the answerer believes should be included in the ALJ's first information request. If an initial statement is filed, it shall also include the names and addresses of any additional persons that the person filing the statement believes is a PRP at the site and all reasonably available information as to the nexus between each proposed additional PRP and the site. Such nominations of additional PRPs are subject to severe sanctions for making false statements, as described in paragraphs III-I and III-J below.

PRPs are not required to file initial statements unless they wish to propose additional questions for the ALJ to incorporate in his information request or to nominate additional PRPs to be added to the BAR process. If a PRP fails or declines to file an initial statement then, absent good cause shown, that PRP shall not be permitted to request that the ALJ propound additional questions in the ALJ's information requests. PRPs are encouraged to organize into common interest groups and to jointly file initial statements, proposed questions, or nominations of additional PRPs. If an initial statement is submitted, it must be filed with the Hearing Clerk and served on all PRPs named in the petition and the initial statement.

D. **ALJ information request and request for production of documents.** Within 60 days after the filing of the petition, the ALJ shall mail an ALJ first information request and first request for production of documents to the Guardian, to all PRPs named in the petition, and to all additional PRPs nominated in the initial statements.

E. **Responses to ALJ information request.** Within 45 days of receipt of the ALJ first information request and first request for production of documents, each PRP and the Guardian shall file its response and documents with the Hearing Clerk. For good cause shown the ALJ may allow a PRP or the Guardian up to an additional 45 days within which to respond. Each PRP and the Guardian shall also have a continuing obligation to supplement its response and/or production upon learning of any new information or documents responsive to the ALJ's requests.

F. Certification of responses. Each response to an ALJ information request must include a certification under penalty of law (see 18 U.S.C. § 1001) by a responsible representative

who meets the criteria established in 40 C.F.R. § 270.11(a) that (1) the response is based on a diligent good faith search of all records in the answerer's possession or control and a reasonable inquiry of the answerer's current and former officers, directors, employees, and agents, provided that such records are reasonably related to, and such persons are reasonably likely to have information pertaining to, the alleged nexus between the PRP and the site, (2) the response reflects all information obtained in the course of conducting such search and such inquiry, and (3) the answerer understands the duty to supplement described in Paragraph III-F above.

G. **Establishment of document repository.** Copies of the responses need not be served on other PRPs or the Guardian, but the ALJ shall establish and maintain during the pendency of the BAR process a document repository where copies of all petitions, initial statements, responses to information requests (including responses to EPA or state information requests issued prior to the initiation of the BAR), produced documents, and all other similar material shall be available to the parties for review and copying at their own expense.

H. **Confidentiality.** The petition, initial statement, information requests, response to information requests, all advocacy or settlement documents, written evidence, and verbal testimony or depositions submitted to the ALJ or placed in the document repository shall be considered confidential in accordance with the following provisions. The submission of such information pursuant to the BAR proceeding shall not be deemed a waiver of any privilege under any federal or state rule of evidence. None of the information or material submitted in the BAR proceeding shall be subject to release under the Freedom of Information Act (except in accordance with EPA's regulations at 40 C.F.R. Part 2), or discoverable or admissible in any other federal, state or local judicial, administrative or legislative proceeding of any kind whatsoever, except (1) to the extent necessary to collect on or enforce the BAR, (2) in a proceeding for judicial review of the BAR, and (3) in any New-BAR proceeding. The discoverability and admissibility of the underlying information (as opposed to the actual written and verbal submissions during the BAR) shall not be affected by this paragraph.

I. **Civil penalties.** Any person, including the Guardian or any governmental entity, who fails to answer an ALJ information request on time, or who files a response that lacks the prescribed certification, or who makes any false material statement or representation in response to an ALJ information request or in any other submission during the BAR process, including a nomination of another PRP, shall be liable for mandatory civil penalties of $10,000 per day of violation. The violation shall be deemed a continuing one until such time as the request is answered or the necessary certification is submitted or the false statement or representation is corrected. Such penalties may be assessed by EPA in accordance with CERCLA § 109 or by any other party in a citizen suit brought under CERCLA § 310. A prevailing plaintiff in such a citizen suit shall be awarded its attorneys fees and 50% of the penalty imposed by the court.

J. **Criminal penalties.** Any PRP (including any governmental entity) who knowingly makes any false material statement or representation in the response to the ALJ information request or in any other submission to the ALJ during the BAR, including a

nomination of another PRP, shall be liable for criminal penalties of up to $25,000 per violation, or up to 2 years in prison, or both.

K. **Identification of all PRPs.** The parties may identify and nominate additional PRPs at any point during the first four months of the BAR process, provided that each nomination must include all reasonably available information supporting the assertion that the nominee is a PRP at the site (i.e., supporting the nexus between that PRP and the site), and provided further that each nomination must be made at the earliest possible time during the BAR. Such nominations of additional PRPs are subject to severe sanctions for making false statements, as described in paragraphs III-I and III-J above.

The ALJ may accept or reject any nomination, whether in the original petition, an answer, or elsewhere, in his discretion. When the ALJ accepts the nomination, it merely means that the nominated PRP will be included in the BAR proceedings and does not mean that the ALJ has determined that the PRP is an LP. Late nominations may be ignored by the ALJ. The ALJ may issue information requests and requests for the production of documents to any nominated PRP at any time and may identify and add PRPs sua sponte. Within 4 months of the filing of the petition, the ALJ shall issue a list of the names and addresses of all parties that the ALJ preliminarily deems to be PRPs, and shall serve such list on all such PRPs and the Guardian. The ALJ shall update such list from time to time as he deems appropriate, and shall serve such updates on all PRPs and the Guardian.

L. **PRPs and LPs not required to participate in the BAR process.** All notified PRPs and LPs are bound by the BAR, but they are not required to participate in the remaining steps in the BAR process. Thus, if a PRP or LP believes that the transaction costs entailed in participating are disproportionate to its likely share of liability at the site, then that party need not participate in the BAR beyond providing full and complete certified responses to any information requests issued by the ALJ.

M. **Joint representation on common issues.** The ALJ may require, at any time, that PRPs wishing to present similar legal or factual arguments utilize a common spokesperson or consolidated briefing for the presentation of such facts and legal positions.

N. **Initial advocacy paper.** Unless the ALJ determines that it would unduly delay the BAR process, the ALJ shall call for the submission of initial advocacy papers by the Guardian and the PRPs (or their designated spokesperson(s)). Such initial advocacy papers should be short and concise statements of the parties' positions with regard to:

1. The legal and factual criteria that should be used in determining whether a PRP at the site is an LP, and
2. The legal and factual criteria, derived from the "Gore factors," any other equitable factors, and the weight of the evidence factor, as set forth in paragraph I-C above, that should be used in apportioning liability among the LPs.

O. **ALJ's first draft report.** Unless, after reviewing the responses to the initial discovery requests and the initial advocacy papers, the ALJ determines that it would unduly delay the BAR process, the ALJ shall issue a first draft report that includes the ALJ's proposed criteria to be used in identifying the LPs, proposed criteria for allocating proportionate shares and establishing the process and schedule to be used to present and evaluate the facts relevant to such criteria. All parties shall then be given at least 30 days to review and comment upon the ALJ's first draft report.

P. **Second advocacy paper.** If the ALJ determines that it would assist the BAR process, the ALJ may call for the submission of a second advocacy paper by the Guardian and the PRPs (or their designated spokesperson(s)). Such second advocacy papers should be short and concise statements of the parties' positions with regard to how the proposed criteria found in the ALJ's first draft report should be applied to themselves and/or to any other parties.

Q. **Opportunity for hearing.** The ALJ shall provide the parties with the opportunity to request a hearing; he may also decide sua sponte to hold such a hearing. The ALJ need not grant a hearing unless he determines that it would materially assist in the resolution of disputed issues of fact, e.g., situations where witness credibility is at issue.

R. **Prehearing conference.** If a hearing is to be conducted, the ALJ may schedule a prehearing conference and may direct the parties or their spokesperson(s), counsel or other representatives to appear at such a conference. The purposes and conduct of the prehearing conference shall be substantially as set forth in 40 C.F.R. § 22.19.

S. **Subpoena power.** The ALJ shall have the power to issue subpoenas to compel the production of documents and attendance of any party or witness at any hearing or discovery proceeding that the ALJ deems appropriate.

T. **Limited Discovery.** Unless mutually agreed upon by the party seeking discovery and the party from whom discovery is sought, discovery is available only as ordered by the ALJ for good cause shown. The ALJ shall regulate the timing of discovery and shall not allow it to interfere with the expeditious conduct of the BAR. In general, the PRPs are encouraged to utilize the ALJ's information requests and requests for the production of documents as the primary method of discovery for the BAR and to offer suggestions and questions for inclusion in such requests. To the extent necessary and granted by the ALJ, discovery shall be modeled on the discovery available under 40 C.F.R. § 22.19. Nothing in this provisions is intended to limit the ability of any party to take depositions pursuant to Rule 27 of the Federal Rules of Civil Procedure.

U. **Informal rules of evidence.** The Federal Rules of Evidence will serve as a guide, but shall not bind the ALJ's conduct of the BAR proceedings. The evidentiary procedures set forth at 40 C.F.R. §§ 22.22 and 22.23 shall also apply to the BAR.

V. **Determinations of liability and proportionate shares.**

1. Nomination of PRPs; determination of liability. The party that asserts (either in the initial petition or a later filing) that another party is a PRP shall submit all

reasonably available information supporting a plausible nexus between the nominated PRP and the site. Any PRP so nominated may seek to establish that in fact the suggested nexus does not exist; any such PRP shall have the burden of rebutting the information provided that supports the existence of such a nexus. (Legal issues such as the § 107(b) defenses, parent/successor liability issues, and the petroleum exclusion, shall be presented in the LP determination step in the BAR process.) Any other PRP may also present information, evidence and comments on whether or not the suggested nexus exists. Any PRP that demonstrates that it is not an LP shall be entitled to recover its attorneys fees from the government agency or PRP that named it as a PRP in the BAR proceeding.

2. **Determination of proportionate shares of LPs.** If the ALJ determines that a nominated PRP is an LP, then he shall proceed to determine that party's proportionate share of liability. EPA has no burden of presenting evidence or argument regarding the proportionate share of liability that should be assigned to that LP. Each LP shall have the option of presenting evidence or arguments in an effort to minimize its share of liability. Any LP that fails to respond to the ALJ's information request(s) shall be assigned a proportionate share of no less than 500% of whatever its per capita share would otherwise have been, or 50% of the total liability at the site, whichever is greater, even if this results in a BAR that allocates more than 100% of the total liability. The Guardian of the Superfund shall have the option of presenting evidence or argument in an effort to minimize the orphan share.

W. **ALJ's second draft report.** The ALJ shall issue a second draft report that includes the ALJ's preliminary determination as to (1) which PRPs are LPs and (2) the proportionate share of each LP.

X. **Third advocacy paper.** Unless the ALJ determines that it would unduly delay the BAR process, the ALJ shall call for the submission of third advocacy papers by the Guardian and the PRPs (or their designated spokesperson(s)). Such third advocacy papers should be short and concise statements of the parties' positions with regard to which of the LPs identified in the ALJ's second draft report are orphans whose proportionate liability should be assigned to the Superfund.

Y. **ALJ BAR decision.** The ALJ shall issue a BAR decision that lists (1) all PRPs found to be LPs at the site, (2) the proportionate share of each LP, and (3) which of those shares, if any, are orphan shares to be paid by the Superfund. The BAR decision shall include a concise explanation of the reasons and basis for the ALJs decision. The BAR decision shall be binding as to all past, present, or future response costs incurred at the site, subject only to (1) judicial review as specified in paragraph IV-B below and (2) the limited opportunity for a New-BAR as specified in paragraph IV-C below.

Z. **Nationwide Service of Process:** In any action to initiate, implement, or enforce a BAR, process may be served in any district where the nominated PRP is found, resides, transacts business, or has appointed an agent for service of process. Petitions to initiate a BAR and initial statements that nominate additional PRPS must be served on each nominated PRP, EPA, the state where the site is located, and any other affected federal,

state or local governmental entity by certified mail and a certificate of service must accompany the original which shall be filed with the ALJ. Demand notices to enforce the BAR shall likewise be served by certified mail.

IV. RELATIONSHIP OF THE BAR PROCESS TO SETTLEMENT AND LITIGATION

A. **Relationship of ALJs to EPA.** The ALJs who shall administer the BARs are to decide BARs solely by the governing statute and evolving federal common law (judicial and ALJ). Due to EPA's direct financial interest in the outcome of BAR proceedings, EPA shall not issue any regulations or guidance setting standards, binding interpretations, or criteria purporting to govern or guide the substance or procedure of the BAR. ALJs are prohibited from considering any such EPA regulations or guidance.

B. **Judicial Review of BAR.** Any PRP that seeks judicial review of a BAR shall file a complaint in the U.S. District Court for the District of Columbia within 30 days of the date of the BAR decision, either setting forth the specific proportionate share of liability that the plaintiff believes should have been assigned to it in the BAR, or stating specifically that the plaintiff believes it should not have been found to have any liability at all. Judicial review of the BAR shall be on the administrative record, which shall include, insofar as they relate to the plaintiff, all materials in the BAR document repository, all pleadings and briefs filed with the ALJ hearing clerk, all discovery documents, transcripts of all hearings or depositions, and copies of all rulings and decisions by the ALJ. The court shall set aside the BAR only if it is found to be arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law or contrary to constitutional right, power, privilege or immunity. During the pendency of the litigation, the plaintiff shall still be required to pay any demand notices rendered for costs actually incurred, subject to later refund if the plaintiff prevails in the litigation, as described below. If the court adopts the plaintiff's proposed share without change, then the Superfund shall pay the difference between that share and the share originally assigned to the plaintiff. If the court does not adopt the plaintiff's proposed allocation without change, then the plaintiff shall reimburse all other PRPs, LPs, and governmental agencies that participate in the appeal for the actual attorney's fees and costs that they incurred in defending the BAR with regard to the liability of the plaintiff.

C. **No Pre-BAR Judicial Review.** No federal or state court shall have jurisdiction to review or enjoin any aspect of any BAR proceeding, except that judicial review of a BAR decision may be had as specified in the preceding paragraph.

D. **New Binding Allocation of Responsibility ("New-BAR").** A New-BAR will not be available until 5 years after the date of the original BAR and then available only if a party requesting it demonstrates that, due to new information not reasonably available during first BAR, a 35% or greater increase in total waste-in volume has been discovered. If a request for a New-BAR is granted, the same rules and procedures described for the initial BAR will apply to the New-BAR. A New-BAR shall only apply to funds

actually expended after the effective date of the New-BAR decision, with no credits for funds already expended. Subsequent New-BAR requests are prohibited until 5 years after the date of issuance of the prior New-BAR.

E. **Impact of BAR process on settlements among PRPs.** Prior to the issuance of the BAR, any group of PRPs may submit a private allocation for the site ("Voluntary BAR") to the ALJ. If such Voluntary BAR meets the following criteria, the ALJ shall adopt it as the BAR:

1. The Voluntary BAR shall be a binding allocation of 100% of past, present, and future recoverable response costs at the site, and/or (with respect to future costs) a binding commitment by the signatories to perform all response actions ever required at the site.
2. The Voluntary BAR may not allocate any costs or requirements to the orphan share, unless EPA agrees to such allocation, or to any non-signatory thereto. This limitation is intended to prevent PRPs from circumventing the normal BAR process by developing a "voluntary" BAR that assigns shares to non-participants.
3. Signatories to the Private BAR shall be entitled to contribution protection and shall be prohibited from pursuing any contribution or cost recovery action against any non-signatory.

F. **Simplified and strong enforcement of BAR by EPA or state agencies.** EPA or state agency (1) files the BAR in federal court in district where the site is located as an enforceable judgment, (2) then files periodic verified statements detailing the costs incurred and their consistency with NCP, and (3) then sends demand notices LPs for their proportionate share of those costs. Demand notices should be sent out quarterly (but no less often than annually) and must be sent to the LPs within 6 months after the costs are incurred. Payment is due within 30 days after receipt of the demand notice.

LPs that receive a demand notice may, within 30 days of receipt, file a petition with the ALJ that issued the BAR contending that the costs were incurred for response actions inconsistent with the NCP. If such a petition is filed, the ALJ shall conduct an expedited hearing on whether the claimed costs are recoverable. The ALJ's decision shall not be subject to judicial review. Payment need not be made, and no interest shall accrue, pending the ALJ's decision. Significant sanctions are available against those who do not challenge recoverability, but simply fail to pay, thereby forcing EPA or the state agency to bring a collection action; these include treble damages, penalties, and interest.

G. **Enforcement of BAR by private parties that settle with federal or state government for the performance of response action ("performing parties").** Performing parties can enforce and collect from the LPs specified in the BAR, subject to any contest over "NCP consistency," as set out in paragraph F above. Performing parties, like EPA, can recover all costs "not inconsistent" with the NCP, whereas under current law, private parties must show their costs were "consistent" with the NCP.

Performing parties can recover treble damages (which they keep) and penalties (which must go to the federal treasury) against recalcitrant LPs, including governmental entities, as set out in paragraph F above. Performing parties are subrogated to all other rights and remedies otherwise available to federal or state governments against any LPs.

Performing parties can enforce and collect the "orphan share" from the Superfund by filing a verified statement of expenses incurred, a verified statement of consistency with the NCP, and a demand notice with the Administrator of the Superfund. If the Superfund fails, without sufficient cause, to pay the demand notice within 30 days, the Superfund shall be liable to the performing parties for double damages and interest.

H. **Additions to "orphan" share.** If good faith enforcement efforts, whether by the government or private parties, against LPs result in a judicial or administrative determination that such LPs are defunct, bankrupt, or insolvent, then that LP's share will be added to the "orphan" share amount and will be recoverable from the Superfund as set out above.

I. **Contribution protection.** LPs that pay their proportionate share and comply with the BAR shall have no other liability, under federal or state law, to any person for response actions or for the costs incurred at the site, provided however that this provision shall not affect any contract for insurance or indemnification.

V. TRANSITION RULES FOR NPL SITES ALREADY SUBJECT TO LITIGATION AND/OR ADMINISTRATIVE ORDERS AS OF THE DATE OF ENACTMENT

A. **EPA/State agency sites.** At NPL sites where EPA or the state has already initiated an RI/FS or other response action, or issued an administrative order or executed a consent decree for the performance of any response action, the BAR process shall not affect the timing or manner of implementation of such response actions. Liability for such response actions, however, shall be governed by the BAR process. Any pending federal or state judicial or administrative action regarding the liability of any party for such response actions shall be automatically stayed and the case shall be remanded to the ALJ for the prompt conduct of a BAR. In conducting the BAR, the ALJ shall, to the extent reasonably possible, give each LP credit for any prior costs incurred or response actions taken by that LP at the site.

B. **PRP-Lead sites.** At any site where a private party has initiated a cost recovery action or other legal action under federal or state law, such actions shall be automatically stayed and the case shall be remanded to the ALJ for the prompt conduct of a BAR. In conducting the BAR, the ALJ shall, to the extent reasonably possible, give each LP credit for any prior costs incurred or response actions taken by that LP at the site.

A26 THURSDAY, SEPTEMBER 2, 1993

The Washington Post

Time to Reform Superfund

IF ALL THE environmental laws that Congress has written in the past two decades, Superfund is the most deeply flawed and troubling. It was created to do a necessary job—to clean up hazardous waste dumps. But it is generating intolerable injustices and urgently needs to be fixed. The Environmental Protection Agency has promised to send Congress legislation later this autumn, and the jockeying over the reforms is already well underway.

One key question is, as you would expect, who's to pay—and (especially) how much. When it was enacted in 1980, the Superfund law was supposed to be a model of the principle that the polluter pays. The cost of the cleanup was to be charged to the companies that had dumped the waste. To ensure tight enforcement, Congress decreed that dumpers would have, as lawyers say, joint and several liability—meaning any dumper would be responsible not merely for its share of the dump but for the whole thing if the other dumpers couldn't be found.

Small companies have found themselves held liable for huge dumps. Where one commercial disposal company went out of business, the courts held its customers liable—and a small firm found itself charged with legal responsibility for all the dumps that the disposal company had ever used. A scrap metal dealer in Virginia sold used auto batteries to a recycling company. The recycler went out of business, and the scrap metal dealer was held personally liable for the mess his customer had made. Some municipalities have found themselves hit with enormous bills when toxic waste turned up in the pits where they had been dumping their garbage.

Many of these cases are grotesquely unfair, and all invite furious litigation as small companies, big ones, banks, mortgage holders, local governments and insurers all go after each other. The joint-and-several feature creates liabilities that are often large enough to threaten companies' existence. That's why a high proportion of the money spent so far has gone not into clean-ups but into lawyers' fees—another defect of Superfund.

To repair it, the joint-and-several language needs to be removed. The Chemical Manufacturers Association has proposed substituting an adjudication process that would limit each dumper's liability to its own share of the mess. The orphan shares would be picked up by Superfund, which in turn levies a tax on the chemical manufacturers. That's the right principle. In its present form Superfund has become notorious for inequity and inefficiency, giving a bad name to a good cause.

Mr. SYNAR. Mr. Spisak.

STATEMENT OF JOHN F. SPISAK, PRESIDENT AND CHIEF EXECUTIVE OFFICER, INDUSTRIAL COMPLIANCE, GOLDEN, CO

Mr. SPISAK. Mr. Chairman, other members of the subcommittee, my name is John Spisak, and I am president and CEO of Industrial Compliance, an environmental engineering and services company based in Golden, CO. We have offices spread across the United States, and we have firsthand experience in actually doing the Superfund cleanups.

Mr. Chairman, you and others today have clearly articulated the problems and the failures of Superfund. But, clearly, those problems are the result of the very familiar strains that we have already heard: Joint and several liability, retroactive liability, arguments over cleanup standards, and remedy selection.

In our approach, called the fresh start, we decided to look at Superfund reform a little bit differently and approach it from the standpoint that if we could tackle one of the core issues, or come up with a core solution that all of these problems attendant to Superfund—joint and several, retroactive, agency management, cleanup speed—would all principally fall by the wayside. And that core approach is to look at a global recognition of cost and funding.

First, we have to be very honest about the Superfund program, and we have to look at the global costs associated with it. Those global costs fall into three principal categories.

The first cost of Superfund is the trust fund program itself. The second cost, or part of the cost, is the money that is being spent in the private sector driven by the EPA 106 process. And the third piece are the cleanups that are being driven by the State-led programs on behalf of EPA or on behalf of Superfund.

We need to get our hands around what those total costs are and identify them, and I submit that the numbers are out there that we can do that.

That leads into funding. We have to have a very broad-based and fair means of funding the process. Because if we do that, we begin to really eliminate the problems with joint and several liability, the litigation, the transaction costs, and the speed with which these sites are cleaned up.

Funding falls into three principal categories. The first category is that we would keep the existing EIT and the petroleum feedstock taxes, but we would add to them.

The second part of funding is broken into two parts: First, Congress would make a decision about what percentage of the global Superfund budget needs to be allocated to municipalities and small businesses.

Why those two groups? Because that is recognizing that all of us in society contribute to the problems of Superfund. We have all thrown things away, we have all disposed of things and, therefore, we have contributed to the problem.

We would add a fee to landfill deposits, maybe a tip fee of X cents or dollars per ton, and we might add a fee to the small business license. In exchange for that, those two groups would be taken out of the system and protected from major litigation.

And the third piece of the funding would be to put together a waste end tax that this Congress has already looked at in detail and passed once in 1986; and that is to use the existing data that is out there. We have a system or a list of priority pollutants that EPA adds to and changes on a fairly regular basis. We also have very strict reporting requirements in this country, where industries with permits who emit priority pollutants must keep track of them, must report them, and must list them.

Then, through a very simple mathematical algorithm or permutation, we rank those pollutants and then we apply them to the balance of the budget required to fund the program; and out comes an assessment per unit of pollutant, or per pound of pollutant.

The unique features of our program do several things. First, we have a pre-1980 or pre-1981 Superfund reimbursability eligibility requirement. If a company can show or demonstrate to the EPA that it followed accepted industry practice, it is then subject to up to 100 percent reimbursement of its Superfund cleanup costs.

We also have created a market driven and broad-based incentive to reduce and eliminate the very pollutants that created this problem in the first place. If we have a system that taxes the pollutants, there is every market incentive to reduce their production.

Next, we deal with orphan sites. In our proposal, we have an accelerated reimbursement mechanism that will drive the private sector into the communities that Dr. Chavis was so concerned about. And we are finally going to get these sites that affect minorities and people of color cleaned up.

And, finally, speed and behavior. Companies are going to want to move quickly because of the reimbursability provision to get their money spent and the sites cleaned so that they can proceed to reimbursement.

This is an opportunity for real reform. If we deny that the existing liability scheme is really not that important in the overall scheme of things, we are being disingenuous. And if all we set about to do here is to play or tinker around the edges, we are merely rearranging the deck chairs on the Titanic.

Mr. Chairman, I would like to thank you for the opportunity to present this proposal. We have presented it to the committee in detail, and we would appreciate it—if you ask us or provide us with any questions, we will be happy to answer them or any additional help or information we can give you.

Thank you.

Mr. SYNAR. Mr. Spisak, thank you.

[NOTE.—A report from Industrial Compliance entitled, "Five Cents on the Dollar," is on file in the subcommittee office.]

[The prepared statement of Mr. Spisak follows:]

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Testimony of

John F. Spisak

President and Chief Executive Officer
Industrial Compliance, Inc.
Golden, Colorado

RE: "Fresh Start" Superfund Reform Proposal

Before the House Government Operations
Subcommittee on Environment, Energy and
Natural Resources

November 8, 1993

Chairman Synar and members of the Subcommittee, I am John F. Spisak, President and Chief Executive Officer of Industrial Compliance, Inc. I am a chemist and biologist by professional training.

Industrial Compliance is a national environmental engineering and consulting firm headquartered in Golden, Colorado with nine operating offices throughout the Western and Southern states[1/]. Industrial Compliance specializes in the full range of technical and regulatory compliance and remediation issues arising from the panoply of federal and state environmental requirements involving air, water and soil media. Of particular interest for the hearing today, Industrial Compliance has a wealth of experience with the federal Superfund program and we are well aware of the program's chronic defects. Indeed, it was this experience that lead me to prepare a comprehensive proposal for Superfund reform, called the "Fresh Start" proposal (copy attached hereto), which directly addresses the serious liability, funding and incentive flaws which, unless comprehensively redressed by Congress, will continue to make the program litigious, wasteful and ultimately unproductive to our society.

America simply can no longer afford the delay and the waste of financial resources by the government and private sector entailed

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1/ Industrial Compliance has offices in Dallas and Houston, Texas; Knoxville, Tennessee; Little Rock, Arkansas; Monterey Park and Sacramento, California; Overland Park, Kansas; Phoenix, Arizona; and New Orleans, Louisiana.

by Superfund's drawn-out, punitive prosecution of private parties. We must "reinvent" Superfund, breaking it free of the wasteful strictures imposed by out-of-date, unproductive thinking. The same type of dramatic "rethinking" exhibited by the Clinton Administration for the health care system and reorganizing the federal government must be brought to bear on Superfund. There is no purpose in simply rearranging the deck chairs on the Titanic. Small "fixes" won't do; major renovation is needed. A fresh start in a bold new direction is needed, based on an honest assessment of the failure of the current system and what is best for our Nation's future.

America needs a fresh start for Superfund that will remove the unworkable "chase and drain" focus of the current Superfund system. A fresh start that will remove the incentives to conduct costly, lengthy legal wars. A fresh start that will elicit the active cooperation of industry and will streamline and redirect the enormous and wasteful bureaucracy to focus on cleaning up polluted soil and water rather than relentlessly "churning" out endless reports and studies. A fresh start that will refocus Superfund on the expeditious and efficient cleaning up of polluted sites and will not ruin viable businesses, jobs, and consumer opportunities, in order to pursue the dead hand of a discredited bureaucratic and legal morass.

Section I of my testimony summarizes the major features of the "Fresh Start" proposal. Section II responds directly to the various specific areas of inquiry identified in Chairman Synar's

October 28, 1993 letter inviting me to appear before the Subcommittee.

Section I

Summary of Industrial Compliance's "Fresh Start" Superfund Reform Proposal.

The "Fresh Start" proposal is attached hereto for the Subcommittee's review and consideration. I urge the Subcommittee to read the proposal in its entirety.

By way of summary, however, the "Fresh Start" proposal would reform the most basic elements of the Superfund program as follows:

- Re-establish the polluter-pays concept to incorporate all consumers who use or discard polluting products and to more fairly allocate financial responsibility for remediating Superfund sites.
- Eliminate the wasteful litigation compelled under current strict joint and several liability by moving to proportional liability (except where there has been a willful violation) and by adopting a new, more efficient financing regime that honestly recognizes and funds the true "global" costs of Superfund.
- Deem the proportional liability for municipalities and de minimus responsible parties to be "orphan shares" financed by an enhanced, broader, and more equitably based Superfund Trust Fund to which these parties must contribute.
- Introduce a new, enhanced broad-based financing mechanism for a "global" Superfund Trust Fund that more equitably and efficiently provides the resources to remediate more sites while creating market-driven incentives to reduce future hazardous pollution.
- Authorize and direct EPA to provide remediation expense reimbursement to businesses for pre-1980 pollution that resulted from generally accepted industry practices at that time. In addition, authorize and direct EPA to provide such "innocent" businesses with accelerated reimbursement of up to 80% of their quarterly expenses during remediation if the business incorporates approved redevelopment of a site which is located in an economically depressed area.

- o Create increased entrepreneurial incentives for redevelopment of depressed economic areas by authorizing and directing EPA to reimburse any non-PRP for its quarterly remediation expenses if the site is located in an economically depressed area and will be redeveloped by that person in accordance with a federally and locally approved development plan.

- o Impose on EPA the management discipline of working within an annual "global" Superfund remediation budget with Congressional oversight that prioritizes cleaning up highest health risks first.

- o Require EPA to establish remedial standards based on science, health-based risk assessments, and ultimate land use.

This comprehensive Superfund reform package will simultaneously improve the Nation's health and economic well-being while restoring financial integrity and public confidence in the Superfund program.

A distinguishing feature of the "Fresh Start" proposal is its enhanced funding mechanism which is designed to induce PRP cooperation with Superfund, make remediation costs more affordable and manageable, and produce the money needed to conduct expeditious remediations. The "Fresh Start" financing regime would require Congress to enact a "global" remediation budget to reflect the maximum cost to be borne by the overall economy through the combination of remediation expenditures by the private sector, EPA and the Trust Fund in each of the next five years. Within this "global" remediation figure specific sites would be targeted in each EPA region. Those targeted sites would be selected by EPA according to health risk priority and approved for inclusion in the budget by Congress. Congress would next determine how much is necessary to raise over and above the existing Superfund taxes to

fund the "global" budget. This net amount would be raised through three broad based sources of fees.

First, a broad based fee would be assessed on air and water emissions generated in the course of manufacturing and distribution of goods and services. These fees could be paid along with the income tax.

While there obviously may be design hurdles which must be overcome in determining which pollutants will be subject to the emission fees, Congress would be aided by the fact that most significant emissions are already the subject of federal or state permits or release report requirements. The fees could be equitably spread across a very wide spectrum of pollutants to avoid economic dislocation to specific industry sectors, varying the assessment according to the respective pollutants' toxicity and volume. Entities already paying the current Superfund tax would be able to credit emissions fee payments against their current Superfund tax liability.

Second, a small, broad based fee would be levied on municipalities' residents (perhaps a tipping fee on municipal solid waste).

And, third, a small, broad based fee would be levied on small businesses (perhaps on their business licenses).

The advantages of this enhanced funding scheme are substantial. This new approach raises substantial revenue and can be adjusted to meet the broadened mandate imposed on the Trust Fund by "Fresh Start".

Companies will be encouraged to re-engineer production processes and develop and employ new technologies to reduce pollution in order to reduce the fees owed.

Furthermore, we believe that the total cost to the economy will be significantly less than the current Superfund program which has sizeable "on-budget" costs to the taxpayer and significant "off-budget" costs to businesses.

But beyond these advantages the "Fresh Start" financing proposal recognizes that all consumers are to some degree polluters. All polluters will pay something toward remediation of the problem which they caused and continue to cause in amounts more equitably tracking their culpability for the past and future pollution.

Section II

Industrial Compliance's Responses to the Subcommittee's Particularized Areas of Interest.

1. Industrial Compliance's view of the effectiveness of the current liability provisions advancing timely and thorough site cleanup:

Industrial Compliance believes that the current Superfund liability scheme does not and cannot work fairly and efficiently. It defies the realities of human and corporate behavior to expect the current liability system, based upon a punitive "polluter pays" concept to produce timely and thorough site remediation. Why?

First, the current "polluter pays" concept focuses Superfund liability on the wrong people. Most "polluters" under the Superfund definition were not breaking any law, were not

consciously damaging the environment, or even doing things differently from others in their industry. These "polluters" were responding to consumer demand for goods and services at low prices.

Second, Superfund has devolved into a "chase and drain" system, where the EPA selectively "punishes" those companies with sufficient financial resources to be deemed a "deep pocket." Once EPA finds a "deep pocket" even remotely responsible for any part of the pollution on a Superfund site (even through post-consumer waste), EPA uses a common law legal concept called "joint and several liability" to require the company to pay **all** of the cost of the pollution clean up. As a result, instead of a true "polluter pays" system, in practice, Superfund is a "deep pocket pays" system. The net effect is to punish profitable companies for past activities which were, for the most part, lawful industry practice responding to market demands at that time.

And who, in reality, bears these costs imposed on the "deep pocket" company? The company's owners, the millions of individuals and corporate investors including pension funds of the employed and the retired, college endowments, and the portfolios of churches and even environmental groups. This inequitable result leads in turn to several fatal consequences for the Superfund program.

The current "polluter pays" doctrine predictably and necessarily breeds debilitating and expensive litigation. Indeed, Superfund's structure, unfairness and punitive attitude toward the "polluter" virtually **compels** the stewards of American business to defend and litigate on behalf of their shareholders, investors, and

owners. Unless Superfund's structure and administration is substantially changed, American business should not be expected to change its litigious behavior. As long as this "deep pockets" conceptualization of the "polluter" dominates Superfund there will be little progress toward cleaning up the ground and water at these sites.

Furthermore, as time goes on, it becomes increasingly difficult to justify in any equitable sense this distorted "polluter pays" approach. Truly culpable polluters have gone and continue to go out of business. Others, though remaining in business, become financially incapable of paying for their share of cleaning the pollution. Remaining profitable companies cannot continue to absorb all the escalating cost of remediation. Employers, large and small, cannot sustain the drag Superfund places on their finances. Thus, the incentive to fight and delay only increases with the passage of time.

2. **Whether Industrial Compliance believes changes to Superfund's current liability provisions are necessary and, if so, what changes Industrial Compliance recommends:**

Industrial Compliance believes that to minimize expensive and debilitating litigation and to maximize private sector cooperation, it is necessary to re-establish the "polluter pays" concept.

The law must reflect the basic fact that the true beneficiaries of the abandoned hazardous waste sites include both industry and, ultimately, the consumer. When we say "industry" pollutes, we're really talking about the millions of individuals and entities

that own industrial America. When Superfund imposes punitive costs on industrial "polluters", it's really America's bond holders, stockholders and rate payers who end up paying the tab.

In reality though, we are all "polluters" since we have all benefitted from the consumption of the goods and services whose price did not reflect the cost of more environmentally protective waste disposal. Moreover, as consumers, we have all had a hand in the disposal of goods either personally or on our behalf which contributed directly to pollution.

Under "Fresh Start's" broadened concept of "polluter pays," all "polluters" should pay their fair share of remediation. Proportional liability would substantially mitigate the principal contributor to the failure of Superfund---litigation. As a general rule companies should only be liable for their fair share of costs of remediating a site based upon their relative contribution to polluting it. (Willful violators of the federal environmental laws, however, should continue to be jointly and severally liable for all clean up costs at Superfund sites.) The general public, as consumers, should pay to remediate orphan sites and pay for orphan shares at sites where financially viable companies are otherwise liable. To accommodate the payment of the consumers' share, an enhanced public funding mechanism would be implemented under the "Fresh Start" proposal.

We do not believe, however, that moving to a proportional liability system is enough since that change does not go as far as is necessary to achieve fairness, mitigate litigation or produce

sufficient remediation funds in a manner which avoids adverse impact on the vitality of America's businesses. In particular, the unfairness of imposing proportional liability retroactively for pre-1980 pollution attributable to generally acceptable industry practice remains a major disincentive for PRPs.

To that end, "Fresh Start" provides remediation reimbursement to a PRP that can establish that its pre-1980 pollution was the result of generally accepted industry practice. Such a PRP would no longer have incentive to fight EPA on such complex and contentious issues as remediation technology, clean up standards, degree of contribution to the pollution and so on since it will know that its remediation costs will be reimbursed once EPA signs off on the final completion of the remediation. Instead, once tagged as a PRP that party would have the incentive to cooperate with EPA and to conduct the remediation as directed by EPA as quickly as possible in order to reach closure and speed the date of cost reimbursement. Indeed, the prospect for reimbursement can largely eliminate pre-remediation squabbling between PRPs as to contribution responsibility since whichever PRP or group of PRPs incurs the remediation expense stands to have those costs reimbursed. In reality, we believe that PRPs, buoyed with the confidence of reimbursement will more readily and more expeditiously cooperate with one another to set up a joint remediation plan acceptable to EPA. Yet the PRP bears a burden of demonstrating generally accepted industry practice to achieve full reimbursement.

The following table summarizes "Fresh Start's" recommended changes in Superfund's liability scheme:

"Fresh Start's" Changes in Existing Superfund Liability Structure

- Eliminate strict joint and several liability for all PRPs except willful violators, and substitute proportional liability.
- Special features of general rule of proportional liability:
  - * Modify "polluter pays" concept to acknowledge that everyone in our society contributed and continues to contribute to pollution.
  - * Consistent with modified "polluter pays" concept, impose an enhanced, broad-based funding mechanism for Superfund in which everyone contributes.
  - * In return for their "Fresh Start" funding contribution, eliminate liability of municipalities and de minimus private sector PRPS.
  - * Reimburse PRPs from the Trust Fund for remediating pre-1980 pollution which PRPs can affirmatively demonstrate was attributable to contemporaneous generally accepted industry practice.
  - * Reimburse a non-PRP's remediation expenses for a site in an economically depressed area if approved redevelopment of the site is included in project.

3. Whether Congress or EPA should grant special liability status to specific groups of responsible parties:

Industrial Compliance does not support creating special liability rules for certain PRPs except in the context of a comprehensive reform of Superfund that simultaneously achieves substantial equity for all other PRPs. The "Fresh Start" proposal represents such a comprehensive reform and in that context Industrial Compliance advocates substantially reforming the liability of PRPs generally. With the express condition that the "Fresh Start" proposal's other reforms are adopted, Industrial Compliance believes enactment of special liability rules for certain PRP groups is justified and advisable from a policy perspective.

In that regard, Industrial Compliance urges that the proportional liability for municipal and de minimus private sector polluters should be deemed "orphan shares" paid for by the enhanced Trust Fund. We do not premise this position on the false notion that municipalities or small polluters did not contribute to Superfund sites; clearly they did and continue to do so. However, the high cost of, and minimal recovery from, pursuing municipal and de minimus potentially responsible polluters no longer justifies that effort. A municipality which contributed to pollution should be considered to have done so on behalf of its residents as consumers. Moreover, a business---whether small or large---which meets de minimus criteria should be shielded from pursuit by EPA or private sector parties. "Fresh Start's" enhanced Superfund

financing mechanism, requiring an equitable but broad-based contribution from all pollution sources (including small businesses and residential consumers) to the Trust Fund, should absorb the clean up expenses attributable to these responsible parties.

This reform for municipalities and de minimus PRPs will build political consensus for Superfund's legitimacy and avoid the ill-will and political alienation felt by municipalities and small businesses across America. It also eliminates Superfund's crushing transactional expenses and financial adversity for those sectors in our society who cannot sustain those burdens. In return for this special liability treatment, these groups all will be making equitable and affordable financial contributions to the Trust Fund under our proposed enhanced funding mechanism.

4. **Industrial Compliance's view of how the "orphan" share of cleanup costs should be addressed:**

In most cases, companies are willing to pay their reasonable share of the cleanup costs. But they are vehemently opposed to paying the entire cost or a disproportionate share of cleanup, especially when their practices may have been generally acceptable at the time of the disposal. The problem is severely exacerbated by the fact that these companies are currently being asked to pay the so-called "orphan shares", attributable to entities either no longer in existence or incapable of paying.

Industrial Compliance maintains that the so-called "orphan" share should be borne by the enhanced Trust Fund. Note that under "Fresh Start" the orphan share would likely increase because of

inclusion of the liability share currently attributable to municipalities and de minimus PRPs. However, in establishing the annual "global" remediation budget called for in the "Fresh Start" proposal, Congress will set the annual Superfund fees at the appropriate level to produce sufficient Trust Fund revenue to cover the cost of remediating any "orphan" shares.

5. What role, if any, should the public play in the Superfund liability process:

The "Fresh Start" proposal calls for a broadened role for the public to play in the Superfund process although not necessarily in the liability aspect of the program.

"Fresh Start" envisions Congress establishing an annual "global" remediation budget that identifies the targeted sites to be remediated each year and provides funding to ensure adequate resources to accomplish the mission. In establishing those "global" budgets, Congress will be relying upon EPA to rank the potential universe of sites according to severity of health risk under the theory that the sites posing the highest health risks should bear the highest priority and be addressed first. This process of prioritizing the inventory of sites will demand broad public participation to ensure both fairness of the decisions and the fullness of the information upon which those decisions are made. We fully expect that part of the "global" budget will include substantially greater funding for community education and

participation activities, the funds for which will be made available and affordable due to greatly reduced transaction costs.

6. The effects of the "Fresh Start" proposal on efforts to restore and develop Superfund sites in economically depressed areas:

One of the strongest public policy attributes of the "Fresh Start" proposal is its environmental equity feature.

First, "Fresh Start" requires Congress to establish the annual "global" remediation budget based upon a health risk prioritization of the inventory of sites. Establishing this prioritization will require detailed inquiry into the threats posed to economically disadvantaged areas. Moreover, expenditures from the Trust Fund and EPA's activities will be dedicated to the sites posing the most danger to human health even if there is no "deep pocket" PRP available to fund the action and notwithstanding the technical difficulty posed by the site. Hopefully, this prioritization will substantially remove any adverse bias that economic status, race or ethnicity may be playing in the current Superfund program.

Second, the "Fresh Start" proposal provides two critically important reimbursement incentives which will accelerate the remediation of sites in economically disadvantaged areas. Where a PRP would otherwise qualify for reimbursement for remediating pre-1980 pollution attributable to generally acceptable industry practice, "Fresh Start" would further authorize and direct acceleration of up to 80% of the quarterly remediation expenses during the remediation itself if the site is located in an

economically depressed area and the PRP agrees to both remediate and develop the site as part of a locally and federally approved redevelopment plan.

But even beyond providing this redevelopment incentive to PRPs, "Fresh Start" does even more for economically disadvantaged areas by providing incentives for non-PRPs to get involved in these sites.

Entrepreneurs who are not potentially responsible parties under Superfund currently are strongly dissuaded from redeveloping sites by the legal liability, expense and delays inherent in Superfund. The result is that Superfund sites, often in key urban locations, become chronic health hazards as well as impediments to redevelopment of the larger community and will remain so indefinitely. Rather than waiting for PRP activity, EPA should be authorized to take advantage of entrepreneurial incentives to remediate sites, especially in economically depressed areas.

To address this problem, "Fresh Start" would authorize and direct EPA to reimburse "non-PRPs" who agree to remediate a site in a depressed economic area and redevelop the site in accordance with a federally and locally approved plan. The "non-PRP" should be reimbursed from the Superfund Trust Fund on a quarterly basis during the remediation to provide the greatest incentive to attack the clean-up expeditiously.

Note that providing reimbursement for non-PRP entrepreneurs will not entail abandoning pursuit of proportional contribution from actual PRPs to replenish the Trust Fund for the costs

reimbursed to the non-PRP. However, the remediation and redevelopment of the depressed site will not have to await successful pursuit of the PRPs as is the case under the current Superfund regime. By breaking the current linkage between liability and remediation, "Fresh Start" accelerates the removal of health risks from the affected local population and rapidly enhances the economic viability of both the remediated site and its surrounding community.

Conclusion:

I strongly urge the Subcommittee to tackle head on the difficult task of comprehensive, structural reform of Superfund and to resist calls for minor "fixes" that appeal to the concerns of limited political constituencies. Minor "fixes" merely will perpetuate the waste, unfairness and ineffectiveness of the current Superfund. America needs and deserves better.

On behalf of Industrial Compliance I want to express my thanks to the Subcommittee for the opportunity to present our views on this vitally important subject. I am available to you for whatever assistance you might find helpful during the legislative process.

Mr. SYNAR. Ms. Mogan

STATEMENT OF KAREN A. MOGAN, DIRECTOR, ENVIRONMENTAL AFFAIRS, NATIONAL FOOD PROCESSORS ASSOCIATION, WASHINGTON, DC

Ms. MOGAN. Thank you. Mr. Chairman, and members of the subcommittee, thank you for this opportunity to provide testimony on Superfund's liability issues. I am Karen Mogan, director of environmental affairs for the National Food Processors Association.

NFPA is a science-based association of the food industry, representing some 500 member companies which manufacture the Nation's processed food.

As you well know, the original intent of the 1980 Superfund statute was to clean up old wastesites as expeditiously as possible, with the polluters paying for that cleanup. NFPA strongly believes that precept should remain the cornerstone of reform today.

To that end, NFPA has participated for over 1 year now in several groups focused on Superfund reform. And without going into all the problems, which have been well documented today here and at other times, suffice it to say that Superfund's primary goal has been diverted from its everyday focus to that of fighting over who is going to pay.

The concept and scope of Superfund have changed dramatically. Originally, citizens anticipated sites such as Love Canal, and there would be a few identifiable polluters. Unfortunately, that has not turned out to be the case. Superfund now has broadened its reach to capture companies and individuals who thought they were doing the responsible, legally correct thing and, in certain instances, were actually directed by government entities to do so.

We now have a blooming PRP population of some 26,000. And in the words of one IRS attorney, virtually every industrial or commercial taxpayer currently engaged in business in the United States will at some time become liable to clean up hazardous waste.

For instance, one NFPA member company is a major PRP as a result of coffee grounds disposed at a landfill. Another food processing industry company was brought in as a PRP because a bread bag bearing its name was found at a site, from which dumping of the company's waste was inferred, although not proven.

To address reform, we set out four principles to guide our efforts. First, the proposal must reduce or eliminate risks to human health and the environment from all listed sites; second, it must do so as quickly as possible; third, it must do so in the most cost-effective way possible; and, fourth, it must be paid for principally by the business community.

The proposal endorsed by NFPA's board of directors seeks comprehensive reform for all parties. While our members could actually present a rather sympathetic case for special handling, we chose instead to seek good public policy and be willing to pay for it.

The first component of the reform package, which we have submitted in detail for the record, proposes elimination of retroactive liability at multiparty sites for disposers of waste prior to January 1, 1987. That is combined with a substitution, proportional liability

for all disposers of waste after that date in lieu of the current strict joint and several scheme now in place.

Exception is made for municipal wastesites, a date tied to the RCRA subtitle (d) effective—is included, and willful polluters are also excepted. They, indeed, should bear site-specific liability.

The rest of the package, as I say—I will not go into detail, because it is really not that far off from what others have discussed. However, having said that, let me state categorically that unless retroactive liability reform is addressed, NFPA and a broad range of small, medium, and large-sized businesses do not believe that reform of the other elements will provide sufficient relief from the costs and resource burdens now imposed by Superfund. The higher costs and continued delays that we feel will be associated with the other proposals will not be warranted without retroactive liability.

I will specifically address municipal site issues because the food processing industry exists in a somewhat unique class with regard to these.

Our wastes are similar to ordinary household wastes and are generally nontoxic and nonhazardous, but they exist in such volume as to preclude the de minimis settlements in most cases. In addition, they are generally the deep pockets at less urbanized sites. So any reform that gives special consideration to municipalities will only exacerbate our problems.

With regard to any "fair share," if it is imposed prior to the 1987 date, it shares the same problems, albeit under a different name, as the current litigation nightmare. Since records prior to that date for food processors and other small-quantity waste processors are minimal at best, any arbiter still must "guess" as to the allocation. This, too, will be a matter of contest, delay, and cost.

Let me address some of the criticisms people have raised about this scheme, saying first of all we must adhere to the "polluter pays" principle. We feel our proposal does, except for willful violations. NFPA endorses a broad-based funding mechanism. Businesses will still pay for the mistakes of the past, but in a more rational and cost-effective manner.

Some suggest that the broad-based funding mechanism and the amount we have suggested will be diverted to other purposes or will not be enough. We feel that if Congress is committed to cleaning up Superfund, then that will be addressed; and in addition, amounts that we have estimated are based on current program expenditures and include an additional amount in order to get more cleanup. If these are wrong, then negotiations are possible.

Last, with regard to the issue of whether this scheme can fly, politically, first of all, I would draw your attention to the nature of the group with which we have been working and its broad-based aspect. It includes companies and industries as diverse in product line and size as Texaco, Phillips Petroleum, the National Automobile Dealers ALCOA, AT&T, Aetna Insurance, and the NETF Project. The American Furniture Manufacturers, the printing industry, NFIB, many of the small business entities, municipal governments represented by Local Governments for Superfund Reform, among others, also have all been involved.

Finally, the Treasury Department and the NAACP have also strongly endorsed elimination of retroactive liability to be sub-

stituted by a broad-based fund. Additionally, the NAACP's entire program is so closely in line with our proposal as to suggest a major platform for reform initiatives is already available.

NFPA took to heart the President's challenge to take the lawyers out of Superfund and to make the program work. Any administration plan that only offers minor reform at the margins is not enough.

Surely, as our environmental awareness has grown, our approach to managing our resources should mature as well. Only children should be given dispensation to argue over "who broke the vase." Sophisticated policymakers, in government and out, should instead be cleaning up the mess.

[The prepared statement of Ms. Mogan follows:]

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STATEMENT OF THE
NATIONAL FOOD PROCESSORS ASSOCIATION
BEFORE THE
HOUSE COMMITTEE ON GOVERNMENT OPERATIONS
SUBCOMMITTEE ON ENVIRONMENT, ENERGY AND NATURAL RESOURCES

Superfund Liability

November 8, 1993

Mr. Chairman and members of the Subcommittee, thank you for this opportunity to provide testimony on Superfund liability issues. I am Karen A. Mogan, Director of Environmental Affairs for the National Food Processors Association (NFPA).

NFPA is the science-based association of the food industry, representing 500 members which manufacture the nation's processed-packaged fruits and vegetables, juices and drinks, meat and poultry, seafood and specialty products. NFPA maintains three food science laboratories around the country that conduct an array of important research related to food processing. We very much appreciate this opportunity to comment on the problems our members have experienced with the program, particularly with regard to the statute's liability scheme.

The original intent of the 1980 Superfund statute was to clean up old waste sites as expeditiously as possible with the polluters paying for that cleanup. NFPA strongly believes that precept should remain the cornerstone of reform today.

To that end, NFPA has participated for over a year now in several groups focused on Superfund reform. A number of important factors brought us into these discussions. Some are related to our very specific member company concerns, others derive from general concerns shared by, it turns out, almost everyone.

First, Superfund is just not working well and is wasting our resources, including billions of dollars, time and personnel. Most importantly, it generally is not achieving its primary goal of protecting human health and the environment. In thirteen years only about 150 of the more than 1300 sites listed on the National Priorities List (NPL) have been cleaned up. This figure does not even include the state sites not on the NPL or the next 1000 sites some anticipate will be added to the NPL by the turn of the century. This failure of the current program is well and sufficiently documented. It is obvious, Superfund's primary goal has been diverted by its everyday focus - that of fighting over who will pay.

More specifically, the concepts and scope of Superfund that were the underpinning of the current statute have changed dramatically. As I have already stated, the original goal of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was to clean up hazardous waste sites, such as Love Canal. Citizens of our country envisioned a finite universe of sites (estimated then to be about 200) where waste was very directly attributed to identifiable "polluters" who either knowingly and/or carelessly disposed of substances known to cause harm. Midnight or illegal dumpers easily wore the "black hat." Where the polluters were not readily identifiable or were unable to pay, the "superfund," a tax based fund, was intended to pick up the costs. [A ceaseless battle to trace a 30-year-or-more trail of business entities, or, over how much any one individual polluter may have contributed to a site was not part of the original understanding.]

This turned out not to be the case. Almost without exception manufacturing, processing, financial/investment, transportation, construction and research industries and federal, state and local government agencies, even individual homeowners in rare instances, citizen clubs and groups now have some involvement in superfund sites, including food processing companies. Superfund has broadened its reach to capture companies and individuals who thought they were doing the responsible, legally correct thing. We even have examples where companies have been named potentially responsible parties (PRPs) even though they had followed government mandated disposal practices or specifically been directed to a particular disposal site. The number of sites has mushroomed to almost 1300 sites with another 1000 or more likely. Instead of the original 50 to 300 PRPs at sites, there are currently 26,000 named PRPs. In the words of one IRS attorney, "Virtually every industrial or commercial taxpayer currently engaged in business in the United States will at some time become liable to clean up hazardous wastes."

For instance, one NFPA member company is a major PRP as a result of coffee grounds disposed at a landfill. Another food processing industry company was brought in as a PRP because a bread bag bearing its name was found at a site from which dumping of the company's waste was inferred.

Recognizing that no one reform proposal is ever going to address each and every specific problem and that no one proposal is going to make the system perfectly fair in all instances, NFPA sought consensus on a proposal that would first and foremost redirect Superfund to achieving its goal of cleanup and protection of human health and the environment. We set out four principles to guide our efforts:

First, the proposal must reduce or eliminate risks to human health and the environment from all listed sites;

Second, it must do so as quickly as possible;

Third, it must do so in the most cost-effective way possible;

Fourth, it must be paid for principally by the business community.

The proposal endorsed by NFPA's Board of Directors seeks comprehensive reform for all parties. While our members could present a sympathetic case for special handling, we chose instead to seek good public policy and be willing to pay for it. We also devised reform for all the elements: liability, remedy selection and program management. No one of the provisions adequately addresses the magnitude of the problems without the others.

The first component of the reform, elimination of retroactive liability for disposers of waste prior to January 1, 1987, is combined with a substitution of proportional liability for all disposers of waste after that date in lieu of the current strict, joint and several scheme now in place. This date relates to the effective date for the implementation of the small generator provision of the Resource Conservation and Recovery Act (RCRA). Exception is made for municipal waste sites, whose liability disposal date is tied to the effective date of implementation of the federal municipal landfill standards under RCRA. Exception is also made for willful polluters. These were the intended targets of the original law and we believe that they, indeed, should bear site-specific liability.

While the focus of these hearings is on liability reform, let me say that the rest of the package -- remedy selection and program management-- is really not so far from other proposals currently being discussed.

However, having said that, let me state categorically, unless retroactive liability reform is addressed, NFPA and a broad range of small, medium and large-sized businesses do not believe that reform of the other elements will provide sufficient relief from the cost and resource burdens now imposed by Superfund. The higher costs and continued delays that we feel will be associated with the other proposals will not be warranted without retroactive liability reform.

It is true that the largest single dollar amounts for large petrochemical companies are expended in remedy selection and program areas. However, for the rest of the PRP universe - the other 25,500 companies - litigation and transaction costs are the major expense and problem. NFPA and other industries feel reform for the 500 without addressing the issues for the 25,500 is unacceptable and unworkable.

The burdens faced by municipal sites also are eliminated under this proposal. With regard to the municipal sites issue, the food processing industry exists in a somewhat unique class. While our wastes are very similar to ordinary household wastes and are generally non-toxic and non-hazardous, they exist in such volume as to preclude de minimis settlements in most cases. Additionally, many NFPA member companies, while large in comparison to a "mom and pop" operation, are still relatively small or medium-sized. However, at municipal sites, particularly in less urbanized areas, they are the "deep pockets." Consequently, the current structure of Superfund cannot and will not cut them out from the longer process. Additionally, any reform that gives special consideration to municipalities and does not

address the concerns of the PRPs left at those sites will only exacerbate NFPA's members' problems and costs.

Other concerns NFPA members have with both the current program, and reform proposals that do not eliminate retroactive liability, mirror the general concerns of small and medium-sized businesses. For instance, contingent liability forces delays in equipment and other investment, compounds the absolute ability to seek credit and drains staff management and research efforts away from product production into litigation. Additionally, any other liability remedy that seeks to apportion or allocate a "fair share" prior to the 1987 date shares the same problems, albeit under a different name, as the current litigation nightmare. Since records prior to that date for food processors and other small-quantity waste generators are minimal at best, any arbiter still must "guess" as to the allocation. This, too, will be a matter of contest, delay and cost.

I will not go into the specifics of our proposal other than to say the details are supplied in an attachment to this testimony. But let me address some of the criticisms others have raised.

First, many advocates of the current scheme suggest that we must adhere to the "polluter pays" principle. Our proposal does. But as I outlined in the beginning of my statement, the concept of who the polluter is has broadened significantly since the enactment of CERCLA. Indeed, in many instances, the actual polluter is not paying at a site. For instance, one of our member companies contracted with a recycler of used cans. This recycler moved his assets out of the country, yet still does business in the U.S.. He, however, has not paid one cent towards cleanup; his customers, who thought they were doing the environmental "right thing" by recycling, are paying for him.

Consequently, NFPA does not believe site-specific payment is the best method of paying. Except for willful polluters, NFPA endorses a broad-based funding mechanism. Businesses will still pay for the mistakes of the past, but in a more rational and cost-effective manner.

Second, to those who say a trust fund concept will set in place a public works program that the government cannot manage, NFPA says the current program is, in fact, already a public works program. EPA already directs, manages and oversees the program. Even where PRPs do the bulk of the everyday tasks, EPA still intervenes in the last analysis. I would suggest that where government might wish to keep the expertise and experience of major PRPs on site, there are other ways to accomplish this.

Some suggest that the broad-based funding mechanism and the amount outlined will not be adequate to the task. Skeptics are concerned about the ability of Congress to actually appropriate and direct the monies raised to cleanup. Let me assure you that NFPA members certainly do not wish to pay more taxes without accomplishing our goal. If Congress is committed to cleanup, then a mechanism can be found to guarantee cleanup. Further, if the amount is not adequate, parties of good faith can reach agreement. Our

estimates are based on current program expenditures and include an additional amount in order to get more cleanup. If these estimates are wrong -- and we feel they are not -- then negotiations are possible. However, businesses would first have to know that such a commitment would derive the needed reform. The ultimate benefit is that money will be directed to the cleanup effort, not to legal expense.

To the charge that we have not given EPA enough time to implement its "many management tools already in place," NFPA counters that if thirteen years and billions of dollars cannot assure a workable program, our citizens cannot afford any more of this "pilot" program.

Lastly, many who are debating Superfund reform have decided not to address retroactive liability, not because of a lack of belief in the need for it, but rather as a result of the judgment (flawed in our opinion) that it does not have "legs." NFPA disputes this and would draw your attention to the nature of the group with which we have been working. It includes companies and groups as diverse in product line and size as Texaco, Inc. and Phillips Petroleum to the drycleaners. It includes the National Automobile Dealers Association, ALCOA and AT&T, AETNA and the NETF Project. The American Furniture Manufacturers and the printing industry, NFIB and municipal governments represented by Local Governments for Superfund Reform, among others, also have all been involved.

Many Members of Congress, both in the House and the Senate, have privately acknowledged the merits of our proposal.

Even environmental groups have in the past found merit in a trust fund approach. While the consensus of these groups now remains centered around the current liability scheme, I feel that if their concerns about adequate funding and proper guarantees as to its availability were addressed, agreement is possible here as well. Only the right leadership signals are necessary.

Finally, the Treasury Department and the NAACP have also strongly endorsed elimination of retroactive liability to be substituted by a broad-based fund. Additionally, the NAACP's entire program is so closely in line with our proposal as to suggest that a major platform for reform initiatives is already available.

NFPA took to heart the President's challenge to take the lawyers out of Superfund and to make it work. We believe that, with an Administration dedicated to "environmental reform," the time has come to move forward with Superfund reform and make all of the changes necessary to accomplish this goal. Any Administration plan that only offers minor reform at the margins is not enough.

Surely, as our environmental awareness has grown, our approach to managing our resources -- all of them -- should mature as well. Only children should be given dispensation to argue over "who broke the vase." Sophisticated policymakers, in government and out, should instead be cleaning up the mess.

Mr. SYNAR. Thank you.

Mr. Reilly, wouldn't a system that eliminates the retroactive liability in favor of an EPA-administered cleanup program result in quicker cleanups versus your allocation system?

Mr. REILLY. We don't really think so. We have seen the Agency act at sites where it has taken the lead, so it is not held down in the least by the allocation process. At a couple of sites in New Jersey, Kramer and Bros., the Agency seems to be able to keep to its extremely slow and inefficient pace regardless of whether the allocation is holding it up or not. When, we think, the PRP does the work and the industrial companies do the work, it really minimizes the drag on our side.

Mr. SYNAR. Mr. Spisak, your testimony mentions redeveloping old sites in inner cities. How would that work?

Mr. SPISAK. What we have proposed is in order to put the focus on these sites, since it is the feeling, and probably factual data will bear out some of this, some of these sites are very toxic and very threatening to the proximity of people who either live on them or near them.

What we are saying is if a non-PRP were to go in and develop and purchase such a site and take such a site over and redevelop that site, they would be eligible under our program for accelerated reimbursement under the fund, that is, for something like 80 percent of their costs every month as they go along if at the same time they would make a clear commitment to redevelopment of that site, which would then either create new facilities, new jobs, or whatever else. That would, then, stimulate other businesses to move into that community for redevelopment because the very source of the problem is now gone. People would not be afraid of incurring liability, and under our scheme someone who came in and redeveloped a site like that would not incur long-term liability, they would be eligible for reimbursement from the fund.

Mr. SYNAR. Mr. McCrory, isn't it true that the government would incur additional transaction costs under the proposals you are advocating because EPA would have to spend more time and resources to identify the PRP and hire and train a new group of ALJs?

Mr. MCCRORY. No, not necessarily. I think what the proposal that we are looking at is similar, to some extent, to Mr. Reilly's proposal and the proposal that has been adopted by NACEPT——

Mr. SYNAR. We would have to identify PRPs, right?

Mr. MCCRORY. Yes.

Mr. SYNAR. We would have to hire new ALJs?

Mr. MCCRORY. Not necessarily an ALJ; you would have to hire someone to do the allocation.

Mr. SYNAR. How do you think the orphan problem should be dealt with?

Mr. MCCRORY. By a cap on the orphan share, but I think there should be increased mixed funding to help pay for the orphan. I think the government should be required to pay a portion of the orphan at sites but that there should be a per site and annual cap on the amount that the government pays.

Mr. SYNAR. Mr. Reilly, Mr. Spisak, what do you think about orphan share? How should we deal with it?

Mr. REILLY. It would be a much healthier program if the agencies were on the hook for a bit of the costs at the site. So shifting the responsibility for the orphan on to the fund I think is healthy.

It also injects a certain amount of fairness on the sites. In a lot of cases, my company will go ahead and clean up the site without really knowing what percent share we have. I have got to convince the vice president with spending authority, it is the right thing and the wise thing for the company to do. It is going to be a lot easier to do that if I have some assurance at the end that we pay fully our share, but not the shares of other parties, or the share of orphans.

Mr. SYNAR. Mr. Spisak.

Mr. SPISAK. Mr. Chairman, the orphan share would be handled if we had a global funding mechanism with a global budget. Because that site would be prioritized according to human health and risk, the orphan sites would then be ranged in the order in which they are to be cleaned up, the budget process would be in place, the funding process would be in place, and the orphan sites would be cleaned up. They could either be cleaned up through private sector development, as I mentioned a moment ago, or the government could take the lead.

Mr. SYNAR. You mentioned this annual global budget in your testimony. Do you have any idea what the global cost to the economy is now every year?

Mr. SPISAK. I think there are a lot of numbers circulating out there. I don't think we have an exact number at this point. But I think the range could be anywhere from $6 billion to $10-plus billion for the economy.

Mr. SYNAR. Now, Ms. Mogan, you were a little bit defensive about your proposal not being a pure tax proposal, but any way you look at it a broad-based business tax to increase the fund moves us away from polluter pays, does it not?

Ms. MOGAN. No, we disagree with that. If you stay with the polluter based concept as envisioned in the statute right now, I can give you example after example where the polluter has gone and is actually still doing business in this country. His consumers are recyclers whose customers are the ones who are actually picking it up and we believe that if the concept is that business is the polluter then business paying a broad-based fund will be paying for the pollution cleanup.

Mr. SYNAR. The key element in your proposal is the elimination of the retroactive liability. Where is the money going to come from to increase the fund?

Ms. MOGAN. As I said, a broad-based fund tax on business. We stayed within the structure of the current chemical and petroleum feedstock, the EIT. We increased the EIT and added in lines for insurers and small businesses.

Mr. SYNAR. You estimated that at $300 million?

Ms. MOGAN. The insurance, yes, sir.

Mr. SYNAR. Can you give us assurances that that is going to be absorbed by the insurers or are they going to pass that along to the customers?

Ms. MOGAN. I think that any cost that is undertaken by government ultimately gets passed on to the consumers, but the consum-

ers are already paying that now as the costs are picked up by business.

Mr. SYNAR. Mr. Spisak, you would institute a waste-end tax. How do you ensure that tax will provide a stable source of funding?

Mr. SPISAK. Well, first of all, I think Congress has to make the decision looking at the global costs as to how much the economy is going to pay every year for Superfund. Once that is done, as the allocation is made across the broad-based list of priority pollutants, that number will be set in motion of X dollars per pound of pollutant per year. If we end up in a situation—and, first of all, let me say that our proposal is based on a 5-year review process. So there is ample opportunity to look at this every 5 years and see how it is performing.

But one of the principal objectives of Superfund was to reduce and eliminate these sites for the future. By attaching this market-driven allocation on the waste end, what we are doing is actually setting up the incentives to do just what you are concerned about and that is reduce the flow of funds to the fund. That will be an interesting problem to have to deal with if all of a sudden we have to come before this group in 5 or 10 years saying that we don't have enough money because pollution has been so dramatically reduced. We will have to deal with that at that time. There should be plenty of money available through this function——

Mr. SYNAR. You have nothing to ensure. You are hoping to take a check in 5 years, but there is nothing——

Mr. SPISAK. I hope as it evolves if it begins to get short then one has to increase the amount per unit, but at the same time it will be actually cleaning these sites up and reducing the list.

Mr. SYNAR. Ms. Mogan, you would agree that the waste-end tax is closer to the polluter pays principle than the broad-based tax, would you not?

Ms. MOGAN. No, I would not.

Mr. SYNAR. What would you say about it, then? Is it farther away from polluter pays?

Ms. MOGAN. Well, I don't think the comparison is closer to further away. I believe how you should look at the idea——

Mr. SYNAR. What I am trying to get to is this: Most critics of your two plans say that your funding mechanisms are inefficient ways of raising funds. How do you respond to that?

Ms. MOGAN. I would say our proposal is very efficient. It keeps the main structure of the program already in place and adds several line items which would be relatively easy to compute and both of the new line items are—the industries that are involved in that are already trying to figure out how best to do that.

Mr. SYNAR. Mr. Spisak.

Mr. SPISAK. I would say it is inefficient because it does keep the EIT and petroleum feedstock tax in place as a base to work from. And then it adds the waste end and it is efficient because the system is already in place to compute it. We already have the requirements for sampling and analyzing the annual production of these pollutants through either permits or reporting requirements.

The voluntary system of computing those assessments, just like you would do your income tax which is done by the companies themselves, the system is already in place. And, in fact, on the en-

forcement and penalty side I would dare say that the environmental laws with the $5,000 to $25,000 a day penalties and the criminal and civil penalties for not reporting in fact are probably stronger than the penalties that might be in place for evading one's income taxes. So I would see it as a very efficient and powerful system for collecting funds.

Mr. SYNAR. Mr. Mica.

Mr. MICA. Mr. Reilly, we are all aware that the existing Superfund program is badly in need of repair. In your written testimony advocating a fair share proposal, you note that the current joint and several liability standard has spawned, may I quote, many cases of waste, fraud, and abuse.

Are you referring to EPA, PRPs, or both?

Mr. REILLY. Those are references to EPA's inability to manage contractors, sir. You take a site like, oh, the Bridgeport site in New Jersey. EPA estimated they would spend $60 million. I think the last estimate was $240 million. At the Kramer landfill, which is just capping a landfill in New Jersey, they estimated cleanup costs were $40 million about 5 years ago. Last estimate we saw from the Agency was $180 million. So the waste, fraud, and abuse issue is EPA's just incredible inability, one, to know where they spent the money, but, two, to manage contractors and just be accountable for how its money is spent.

Mr. MICA. At one point I was given some information that EPA contractors, something like 80 percent of the EPA contractors, are former EPA employees. Is that something you are seeing out there, too?

Mr. REILLY. Actually the contractors get some of the better EPA employees so that hasn't really been our concern. Our concern is that the Agency doesn't seem to know how to manage a budget. And again, with joint and several, it says every dollar they spend comes out of our pocket eventually. There is simply no signal for the system that says at some point we have spent more money than is possibly justified and we have got to control it. That, to us, is one of the most fundamental problems in the current law, sir.

Mr. MICA. Mr. Spisak, you seem to be nodding in affirmation. Maybe you wanted to comment.

Mr. SPISAK. Yes, sir. Clearly, if we were to go with a global budget and funding approach, that would impose several very important disciplines on EPA. No. 1, EPA would have to prioritize the sites according to human health and toxicity. They would have to come before Congress because they would now be the stewards of this greatly enhanced fund in the reimbursability scheme and they would have to establish a schedule and a set of cleanup objectives.

Every year when they came before Congress, if they were not meeting those objectives, Congress obviously would take serious issue with the Agency, because now the Agency would have few excuses from which to proceed. They have the funding. They clearly have the tools in place through the 106 order and the other processes that they have, the situation would have now become cooperative instead of confrontational and if sites aren't getting cleaned up it is going to be clearly because of EPA mismanagement driving unreasonable and irrational cleanup standards or cleanup levels.

So I think, very important, by attaching this new mechanism to the process, you will have major impacts on the administration of EPA, plus you will tend to get them out of the business of remediating these sites because there will be more private sector impetus to get this work done and get it done quickly. They won't have to focus so much time and effort on managing the work.

Mr. MICA. I want to come back to you, but Mr. McCrory wanted to add something here.

Mr. MCCRORY. I don't think we have to wait until the implementation of a public works system to determine that EPA can't manage their contractors. I think that the Congressional Budget Office and GAO have testified consistently in front of Congress that EPA is not doing a very good job. As a matter of fact, they are doing a very poor job in managing their environmental contractors.

I think that also if we look, and hopefully Mr. Reilly can bear this out, we will see that 70 to 80 percent of the cleanups that are being done at sites now are being done by the PRPs, and that there is a reason for this. The reason is they know the PRP's can do it faster and in a more cost efficient manner than if the Federal Government does it.

Mr. MICA. Now, back to Mr. Spisak for a second here. You have commented several times about increasing sources of revenues or taxes or fees. Could you elaborate? I am a little bit unclear as to how specifically you wanted to put additional money in the kitty.

Mr. SPISAK. What I am trying to do is, right now we have Superfund broken into kind of an on-budget which is the trust fund and kind of an off-budget which is the private sector driven costs of the program through the EPA 106 process. And those two are separated.

Mr. MICA. Had you spoken about some existing taxes and funding mechanism and expanding authority in your comments?

Mr. SPISAK. Yes, sir. The EIT which is already in place, the petroleum feedstock which is already in place that provides a percentage of the funding available what we are saying is adding this waste-end type of assessment on the priority pollutants based on their relative impact to health and the environment which would bring up the funding for the rest of the program, as well as the fee that would be added to waste going into landfills which would take the munis out and also the small business tax out either on their business license or some nominal payment which would then take them out of the litigation process.

Mr. SYNAR. Let me stop you and we will go another round, a second round.

Mrs. Thurman.

Mrs. THURMAN. Mr. Reilly, in addition to working with CMA, you have been working with various parties to craft a hybrid plan which you discussed. As I understand it, such a hybrid plan would exclude small businesses and municipalities from the liability system while applying an allocation system to the larger parties; is that correct?

Mr. REILLY. Ma'am, there are a lot of ideas that build on fair share. I think ideally we would find a home for everybody within there, that is the insurance people, the small businesses, and the municipalities. At this stage I would say we don't have buy-in from

all of the most important parties. And I think one of the reasons is it is a fairly new idea. But we really do think, for instance, that the small business, a segment of the economy would support a tax to pay for its share at the site, then this crushing blow from the program might be relieved or they may say just have an ability-to-pay test. There would be some mechanism where they would fit comfortably within fair share. We are optimistic but we simply don't have all the parties lined up right now.

Mrs. THURMAN. You said the insurance companies have that because that is a part of your plan, as I understand it.

Mr. REILLY. Again, one of the biggest problems we see with fair share is that it may not do enough to solve this dilemma we have with our insurance carriers. Right now most of the big companies have got a protracted, ugly, costly case against their insurance companies trying to recover what we think are costs due to us under our older policies. We do not enjoy suing our carriers, we consider all the transaction costs just money down the drain, and we also hear the insurers say that they are willing to throw some money into the coffers of Superfund if we can resolve that issue.

In a perfect world, DuPont believes all this would be combined. The insurance industry would put some money into the fund and our cases against them for these NPL sites would be resolved. And these are evolving ideas. I would say there are still a fair number of loose ends. That would be very good if we can come to that.

Mrs. THURMAN. How many insurance companies are still writing liability?

Mr. REILLY. I would say for environmental liability, if you need a policy right now, you are going to pay an awful lot and get very little for it. But again the carriers can't wipe out effectively the old policies, the current policies they call them, that were written before roughly 1980 which a lot of courts have interpreted to cover—today you can recover on a policy written, say, in the 1970's if that is when the occurrence is. Most of the newer insurance companies, they call them claims made, so if you don't make a claim during the policy period, that is it.

Mrs. THURMAN. Mr. Spisak, you look like you were ready to jump in there.

Mr. SPISAK. Yes. One of the real advantages of the reimbursability portion is that it would dramatically reduce the outstanding liability that insurance companies would face relative to these sites. It would put them more in a position of looking at this from a more actuarial standpoint and also looking at it from more in a position of what the behavior and activities of the company are.

I would anticipate that in that covered there would be a strong admonition on the part of the Congress and the administration to the insurance industry if they get on with the business of settling these cases now that their outstanding liability has been dramatically reduced because of the reimbursability feature of the fresh start proposal.

Mrs. THURMAN. Well, let me propose the same question I stated earlier: In relaxing some of the liability, the retroactive liability, what if we made it in a way that we take a look at some of those issues if we made companies come up to the standards of today,

saying you could participate if you were in compliance with the environmental laws as today is?

Ms. MOGAN. Apart from it not being the policy per se that we have endorsed, nevertheless, it has the potential I personally feel for addressing one of the criticisms of the site management, and not allowing EPA to become involved, that might be a way of eliminating liability in fact and yet allowing for some sort of management but again that is a personal feeling.

Mrs. THURMAN. Do any of the others have a comment?

Mr. REILLY. I am sorry. I didn't quite get the question. Take an NPL site and bring it up to today's standard?

Mrs. THURMAN. Say, if we looked at the liability issue and we came in and instead of trying to go through all the legal matters of deciding who was responsible, who wasn't responsible, and that company—maybe it is the company in fact, came up to the environmental standards that have been set for that company in how they deal with waste or monitoring or audit trails or any of that. Would that be an incentive? Would that be something that we could use out there to maybe sell to the rest of the government by saying, look, these guys are being good guys even though from what I understood was a smooth background, they weren't bad in the first place?

Some of this was never done based on the fact that they were negligent or grossly negligent but more from a standard that it wasn't accepted practice later on as they found out, but if we found some incentives in there?

Mr. REILLY. I would say as far as our existing sites, we believe they are at 100 percent compliance today and we may slip now and then but there is no issue around our existing sites. We are in compliance. That doesn't get to the issue of what to do with the back 40. If the back 40 is presenting, say, no environmental risks now, how many billions should we be spending on the back 40 to dig it and burn it? Those are very, very unresolved questions.

As far as, say, another piece of property, let's assume we are encouraged to adopt a brown field. The problem we have got now, if you adopted the brown field you have no idea what it is going to cost, but you very well could spend $10 million and at the end have a piece of property worth $100,000.

It makes no economic sense now for companies to say adopt a piece of land that is contaminated because the expectations on what you have to do to clean it up are just so extravagantly unpredictable and out of control in most cases.

Mr. MCCRORY. Additionally, EPA currently allows for environmental credits for supplemental environmental projects, so if a PRP agrees to do environmental audits and change their current behavior, et cetera, they are provided or there is an opportunity for them to be provided environmental credits now. So I don't know that that system would necessarily help.

Mr. SPISAK. I think there is a very powerful incentive already built into the program and that is the reimbursability allocation. If a company knows that over the time it takes, several years, to do this cleanup that it is going to be having to make that claim for reimbursability, its behavior is going to improve dramatically in its workings with the Agency and the public so that in areas where

it is having a difficult time demonstrating standard industry practice or acceptable previous industry practice or what it did years past, it is going to hope for the benefit of the doubt and the best way to do that is with the incentive in the program to be a very good corporate citizen and that incentive is going to be built in because it is going to effect the amount of reimbursement that it is going to get.

Mr. SYNAR. Mrs. Thurman, let me give you another round in just a second, too.

Mr. McCrory, let me get back to you. Aren't the laws we have today enough to deter irresponsible corporate environmental behavior?

Mr. MCCRORY. Current behavior?

Mr. SYNAR. Yes.

Mr. MCCRORY. You mean including Superfund?

Mr. SYNAR. Right.

Mr. MCCRORY. Yes. I think Mr. Reilly is probably correct that current environmental behavior has changed greatly because of the Superfund program and other environmental laws.

Mr. SYNAR. Ms. Mogan, these proposals to eliminate retroactive liability the GAO, as you heard, contend that the PRPs will no longer feel any responsibility or reason to clean up these contaminated sites that are not presently listed on the NPL. How do you respond to that?

Ms. MOGAN. Well, I have given you a, for instance, under the—reversing that, under the current situation we have a company that is in a particular site that the State actually wanted to keep a private site and gathered up the PRPs as they knew them, tried to get them to negotiate and because they were afraid to take on the liability, they refused to clean it up and the State had to throw its hands up and put it on the NPL. So as a matter of fact, with the current liability scheme——

Mr. SYNAR. I can give you one on the exact opposite in Bartlesville, OK, where we are dying to keep it off the NPL list for tourism and image reasons.

Ms. MOGAN. Again, I think it is still a matter of the focus on who shot John, instead if we were to redirect our resources to getting cleanup, we would be able to get that off the table, look at the new technology, and look at better contract management.

Mr. SYNAR. You are using the cutoff date of prior to 1987 for eliminating retroactive liability. That is pretty generous to industry by any standard. Why the 1987 cutoff date?

Ms. MOGAN. It was tied into the Newman test requirements to install quantity waste generators, so there is actually some record.

As I noted in my testimony, we actually pick up a proportional liability share for the future after that date, because you can determine—you have the records to determine what was sent and who sent it prior to that, particularly for the small quantity waste generators, even if they are, they are a large company; if they had less than a particular amount, they didn't keep records, they didn't keep records of who sent what where.

Mr. SYNAR. The draft proposal by the Treasury Department uses December 1980 as a cutoff date. Could you live with that date?

Ms. MOGAN. I think everybody who has talked about this said those dates are arbitrary. To the extent they were still negotiable, we had a rationale for ours, they had one for theirs, and I agree an agreement could be reached.

Mr. SYNAR. OK.

Mr. Reilly, you say retroactive liability relief is a political poison. If you could have what you wanted, wouldn't it include some of that, though?

Mr. REILLY. It is tempting, Congressman, to think of just giving this whole fiasco back to the government. It really is a debacle in many ways. Right now, when sites are cleaned, it is almost in spite of government instead of because of the government. Nonetheless, when we see the stunning inability of EPA to manage contracts—let me give you just a 2-second story here.

There are two landfills in southern New Jersey. One is called Kramer. One is called Gem's. They are very similar. Roughly 60 acres apiece. Private industry is cleaning up Gem's. It is going to cost us about $65 million. The government is cleaning up Kramer. The last estimate we saw was $180 million. That is a factor of 3 and that is not dissimilar from what we see in other government contracting.

If we give this program to the government with that kind of cost control, that money has got to come from somewhere and, frankly, we are concerned it is going to come right back off of our hides so we are willing to stay involved. Despite all the unfairness of retroactive liability, we are staying involved in controlling those costs.

Mr. SYNAR. We have been arguing up here while you all have been testifying about moving this whole program out from the EPA to somewhere else. What if somebody else administered it?

Mr. REILLY. I used to be in the Corps of Engineers, Congressman.

Mr. SYNAR. That is what we were arguing for, a new mission for the Corps of Engineers.

Mr. REILLY. I think it would be managed better, but as long as EPA can be in there tinkering, as long as there is "free" money on the table, I guess I am not optimistic it would not be as great. By the way, one of the landfills, EPA contracted with the Corps to manage, but somewhere in there when there is a free kitty of money, you just can't seem to keep the lid on the darn process.

Mr. SYNAR. Mr. McCrory, a lot of the environmental groups are in favor of maintaining the principle of polluter pays. Why should companies which disposed of wastes illegally and not in accordance to the industrial practices of their time not be treated as polluters?

Mr. MCCRORY. I am sorry, Mr. Chairman. There were too many negatives in that.

Mr. SYNAR. Why should people who dispose of waste legally and pursuant to the law be treated as polluters?

Mr. MCCRORY. Well, this is basically a status offense, as you explained when defining strict liability. It is a no fault offense. Somebody has to pay, and I think Congress in its infinite wisdom decided that the best people to pay are people who are associated with the site and who have actually caused the harm at the site.

Mr. SYNAR. Even though they were legal and pursuant to everything?

Mr. McCRORY. I guess, Mr. Chairman, the question is: If they don't pay, who does?

Mr. SYNAR. Do you agree with Dr. Chavis that the strict joint and several liability system has destroyed our ability to redevelop contaminated areas particularly in the poor areas?

Mr. McCRORY. I don't think that you can tie redevelopment in inner cities directly to Superfund necessarily. I mean, certainly there are problems in our inner cities other than Superfund. I think that strict joint and several liability or at least Superfund liability itself has added to the problems, but there are other——

Mr. SYNAR. What about Mr. Gibbs saying he wanted to buy some property and can't?

Mr. McCRORY. That was actually what I was going to address next.

Mr. SYNAR. Good.

Mr. McCRORY. I don't understand what the problem was with him purchasing property. I guess maybe his attorney didn't talk to EPA about——

Mr. SYNAR. The lenders. The lenders.

Mr. McCRORY. Well, I understand that.

Mr. SYNAR. These bankers live in my office.

Mr. McCRORY. I understand that. I understand that completely even though they have relatively low potential liability and they have a specific exclusion under Superfund.

Mr. SYNAR. They don't think that——

Mr. McCRORY. I have had a meeting with small businesses. Karen Mogan and I have been meeting over the last 3 weeks. I understand the problems but what I am saying is right now EPA has the authority to let these people out for prospective purposes. It is called prospective purchaser agreements and they have guidance on that.

We have been talking to EPA and the government and small businesses about incorporating that into the statute. That is prospective purchasers can come in, purchase a property, clean it up, and be completely released for future liability out of that site. This is something we have been looking into with the EPA and we have been trying to discuss this with all parties in interest.

Mr. SYNAR. One final question to you, Mr. Reilly, then I will give it to Mr. Mica. Doesn't the CMA's plan favor large companies because they keep better records?

Mr. REILLY. I saw that testimony from some other people and it simply is not the way the real world works, sir. Big companies have records control programs and we generally toss things in about 3 years. Nothing is as surprising to the big companies as to get into one of these sites and find that some little companies have never thrown a scrap of paper away since they were created, so I just could not follow that logic that the big companies are the ones more likely to have more records.

But having said that, you are actually better off at a site without a record than with a record, so there are really two problems I have with that.

Mr. SYNAR. Mr. Mica.

Mr. MICA. Thank you, Mr. Chairman. I think really to summarize what we are hearing today and, correct me if I am wrong, is

we all—everyone—who has presented a plan or interest in this sees that we have to do something about liability, correct, and in most cases retroactive liability given certain dates. I don't think there is anyone here that wants to see us prior to that 1980 date, is there? I mean, we could all settle on that if we are going to come back and correct this.

You had some questions, Mr. McCrory, you know, but I think you could live with that, too, if it was fashioned correctly. Is that correct? Is that proper?

Mr. MCCRORY. No. We have a problem with any kind of "carve-out" of PRPs' retroactive liability. We think——

Mr. MICA. But, you know, what about being liable even when the statute doesn't exist? You still have a problem.

Mr. MCCRORY. We still have a problem.

Mr. MICA. But for the most part business, though, sees that as something we must address. Every one of us sees EPA management of the program as a problem. I think that is unanimous.

The other thing, too, is almost everyone has said that the private sector deals with this where other entities have the potential to deal with correcting these cleanup situations in a much more timely and also cost-effective manner; is that correct?

Mr. MCCRORY. Yes.

Mr. MICA. So we all agree on one of those principles.

The chairman has mentioned one and I might favor that as giving it to another agency, from what I see so far.

Mr. SYNAR. I just mentioned it.

Mr. MICA. I endorse the chairman's proposal.

You mentioned, Mr. McCrory, the problem of, and I have heard this before, the dual liability or dual jurisdiction of Federal and then State. And people are getting hit twice. Is it possible, also, to maybe turn this over to a State responsibility. And if any of you would like to comment about that, maybe we could just go down the line, I would like to hear your reaction.

Ms. MOGAN. I would like to say that in our proposal we did indeed allow for State opportunity to take on that program and that would again be one way of going around EPA's bad contract management.

Mr. MCCRORY. Well, being a former deputy attorney general for the State of Indiana doing environmental enforcement, I would say, no. There are certainly some States that can handle the Superfund program but many other States simply can't.

Mr. MICA. What if we qualified those States?

Mr. MCCRORY. Well, qualification certainly is a start and then, of course, the States are saying——

Mr. MICA. But you are saying some States could handle it?

Mr. MCCRORY. Probably some States could and we at NRDC are talking about an increased State role, but completely giving the program over to the States is probably a big mistake.

Mr. MICA. Mr. Spisak, what do you think?

Mr. SPISAK. I think it is important that ranking, prioritizing the sites and consistency be involved in that process. I think if there was a fair way for the Federal Government to make sure that State programs, as you mentioned, were qualified or properly structured

to do that, as well as to deal with the funding and the cost issues, it probably would—it could probably work.

Mr. MICA. Mr. Reilly.

Mr. REILLY. One, of course, we really do think remedy reform needs to be addressed, but once that is addressed, industry just wants one master. We can't have two masters at any given time.

Mr. MICA. If it was given to one specifically, you could live with that?

Mr. REILLY. Absolutely. The States or the Feds, not both.

Mr. MICA. We can address this liability question statutorily and we need to, there is no question about it, but then you turn it back to the same things wrong that have been mismanaged. What you have now, and also with some of your proposals expand the number of potential sites and activities that they become involved in. They can't handle what they have got now. I am concerned that they can't handle what you might give them in the future. Do you—any of you—wish to comment on that?

Mr. REILLY. I think there are some things that just make the program very, very difficult right now. And some of the suggestions we have made would get those out of the law. Like I think chipping away at mixed funding as well. That is as likely to cause more problems as it solves. When EPA tries to get into a de minimis settlement, all that does is infuriate the larger parties that want to clean up the site.

I really think that if we went to the allocation proposal that CMA has proposed and got all those squabbles out the agencies face, I think we really would have a much better program. We would know within 18 months who is paying the bills and what share. Industry would be in the leadership as far as cleaning up the site and I think that is about as good as you are going to do with a program like this.

Mr. MICA. Well, I have concerns about giving more money to the Federal Government, to an agency that has proven its ineptness.

Mr. REILLY. We would not increase the amount of money the government has got at all under our program. We would say, yes, there is a little more draw to cover the orphan but the inefficiencies in the current program coupled with remedy reform, we think there are enough taxes right now.

Mr. MICA. Mr. Spisak, you wanted to comment?

Mr. SPISAK. Mr. Mica, what our program effectively does, it establishes the fund. This money does not go to EPA. EPA merely provides the reimbursability to the PRPs. The budget discipline by having EPA meet its targets and explain to Congress where it has been on a regular basis is the discipline that is imposed on the program. They do not get their hands on or have access to that money. That money is set aside from reimbursement which would speed the process and drive the PRPs to get these done quickly, efficiently, at low cost, because they have got money at risk over time and it is simply a fund in which they would be reimbursed. EPA would not touch that money.

Mr. MICA. Has any of the industry come up with a single legislative draft to chew on that incorporates at least the liability question?

Mr. REILLY. Sir, I think that ideally the industry would all be singing the same song. I sure hope we get closer to that but until we are singing the same song, I guess drafting legislation is a bit premature.

Mrs. THURMAN. If you would yield for a second?

Mr. MICA. Yes.

Mrs. THURMAN. One of the things that we are supposedly good at is making you all start singing the song together. Could we help you with that?

Mr. MICA. Well, until you do, you know the process as well as I know the process. You don't get anything accomplished and the chairman is besieged with people, lenders, other folks, the insurance agency is beside itself. I have heard from them. But if there is some commonality as far as a proposal to deal with the liability question, and, you know, it is going to be tough enough to get us to agree on it, but you all need to get your act together and come forward with something that we can chew on or it will be done to you rather than for you.

Mr. REILLY. I think that is a very effective threat, sir, and I sure hope that we are able to do it.

Mr. MICA. I am told that EPA is going to have their proposal before us November 30, which I am waiting with bated breath for.

Mr. SYNAR. Thank you, Mr. Mica.

Mrs. Thurman.

Mrs. THURMAN. Let me go through a series of events that happened in Florida, and I hate to keep going back to this but I haven't been around here to understand the intricate details of the Superfund. I have been dealing with this issue at the State level.

Mr. McCrory, I will tell you that I disagree a little bit with your plan because I think the most important thing is to get sites cleaned up and not worry about liability.

Let me tell what we did in Florida on underground storage tanks. We went in and did an EDI, early detective incentive program. We said to the gasoline stations, we think it is important that you come up to us and tell us that you think you potentially have a problem. We gave a period of time in which these people could come in and tell us that they might have a problem. Meanwhile, we passed a 10 cent per barrel gasoline tax and started a type of a Superfund, but it was specific for underground storage tanks.

These persons became eligible for the funds because they came and told us they had a problem. We didn't have to go out and search for them and the gasoline did not show up in water systems.

Actually, to be honest with you, we ended up with a whole lot more than we thought we were going to get. We also dealt with the abandoned tanks. We did a lot. But we did it by reducing the liability, by saying, come in, tell us, we think it is more important.

How do you react to that?

Mr. MCCRORY. OK. I think the last part of your statement addressed my first question which is, what happened when the money ran out, and what you said is, we expanded the program. I think that simply expanding the program in the State of Florida may be a little bit easier than doing it in the U.S. Congress.

Mrs. THURMAN. We did a trigger so if it went below a certain portion then it triggered and so that you always had a certain $50 million or another dollar amount in the fund.

Mr. MCCRORY. What we are looking for is something that will prevent us from being here again arguing these same issues in 4 years. We don't want to be back in front of Congress saying, oh, I am sorry, EPA, Army Corps—or whomever—is not doing the work that we thought they were going to do. Cleanups aren't going as fast as we thought they would be. They are costing three times as much as we thought they were going to cost and we are out of money. Therefore, we need more taxes; we need more appropriations.

Mrs. THURMAN. But with that, what we have heard in testimony today, that the money that has been spent hasn't gone toward cleanup, it has been spent on determining who is liable.

Mr. MCCRORY. No, no, no. What you heard today was that the money that is being spent is being spent on arguments over remediation, not on liability. Now, I don't know what is happening in third party cases and I don't know what is happening—well, the gentleman from Vermont testified that they spent about $20,000 on their sites—wait a minute.

Mrs. THURMAN. But wasn't it $40 billion that had been spent——

Mr. REILLY. I think the RAND estimate of about one-third of the money is going for pure, just lawyer overhead and stuff sounds about right to us.

Mr. MCCRORY. But the question that was asked—this was actually asked Webco. The question that was asked was, what was the problem at the site, what was causing all the problems at the site? Was it the liability? And I wrote down Webco's answer, because I heard it and it was the correct answer. The problem was with EPA over remedy and remedy selection. They didn't have a problem with liability. The problem that they had was in remedy selection. That is where the delay is. You have heard Kate Probst also testify to the same thing. Even though liability may add some to the actual time it takes to get a site cleaned, it is not where all the time is being spent. Where the time is being spent is during the RI/FS process, the RD/RA negotiations, determining what the RODs are going to be at the site, and then actually doing the work at a site. If it takes 10 years to clean up, it is only a fraction of that time that is actually associated with litigation and negotiations related to liability.

Additionally, you understand that under the current system, under section 106, which EPA has started using a lot now, under section 106, the United States can order a PRP to do a cleanup regardless of a determination of liability. Liability has absolutely nothing to do with EPA's authority under 106 to order PRPs to do cleanups at the site. That is to say, they can order a PRP to do a cleanup before a determination on allocation or liability is even decided. And there is lot of case law that supports that.

Mr. REILLY. Ma'am, let me make one comment on your approach to underground storage tanks and I have heard other States do that, too. Iowa. It seems like when the politicians are dealing with small businessmen that they clearly can wipe off the face of the earth, there is a certain amount of sympathy and they give march-

ing orders to the regulatory authority: There is no sense in bankrupting our small businesses, let's do something sensible.

When you have got a DuPont, there is some feeling that you have got a free pool of money. Hey, anybody want any of DuPont's money? We can reach in their pockets and pull it out. It doesn't matter whether it is being spent wisely or on international competition or research or maybe go to health care. It just looks like free money. So you get a tremendously different dynamic when you got the deep pocket parties in there that are potentially responsible for remediation and whatever else.

Mrs. THURMAN. Let me ask this question. These Superfund companies—are they the DuPonts? I don't get that impression from the people I see in Florida. And how many other sites are there?

Mr. REILLY. When we see Congressman Zeliff's report, apparently there are no deep pockets to protect those little companies up in New Hampshire and they are just getting blown away. The sites I am most familiar with, we are in it, so what we tend to do is, big companies tend to pick up the check. And if we want to sue a little company, it is not very much fun. Regrettably, some big companies have sued some little companies. DuPont thinks it is a waste of resources. There is really a different dynamic depending on whether you get some big companies in there to pay the bills.

Mrs. THURMAN. I would just suggest at least from the sites we have in Florida some of them are, some of them aren't, I mean, so I don't know that I would——

Mr. REILLY. But a company today was being pilloried. ARCO was being dealt with, talked about a bit today as though somehow it was being unfair to some of the smaller parties. Well, I think ARCO is cleaning up that site. ARCO may not have any ill will against the small parties, but the process is harsh. Those little parties got put in their boxes. So there is no great answer if we keep this liability scheme.

Mrs. THURMAN. Mr. Chairman, I know that we have to get ready to go over to the floor. Let me just say to you all that I am willing to work with you. I think this is a very important issue. I hate to admit this but I probably spent 6 years of my time in the Florida Senate doing an underground storage tanks bill from the beginning program and then going into self-insurance plans because of the issue that we had of not being able to get insurance coverage.

We get the cleanup sites. We have started doing this. We have started positive things. Now we have got insurance coverage back which is also going to eliminate the idea of having any kind of sites eventually. So I think of all of the things that I have been involved in, that is probably one of the more interesting and certainly was the most satisfying when you see something really positive happen.

And I commend the chairman because I can't think of anything more important than getting on with the cleanup and forgetting all of this arguing and fights and worrying about who is what and why and when and how, but let's just do it.

Mr. SYNAR. Thank you very much.

Let me, first of all, thank all of the witnesses who appeared before us today, and also the staff. Let me conclude with these remarks.

Superfund was never intended to be a government black hole project nor a lawyers' relief fund. Thirteen years and billions of dollars later serious problems still plague this program. I am convinced that the plan to fix this program is yet to be written. I am also convinced that the plan that fixes this program will have one simple theme: Move dirt. And until we get to that point, we will continue to explore it in this subcommittee and in this Congress.

Thank you for your attendance.

The subcommittee is adjourned.

[Whereupon, at 4 p.m., the subcommittee adjourned, to reconvene subject the call of the Chair.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

EDOLPHUS "ED" TOWNS
MEMBER OF CONGRESS
10TH DISTRICT, NEW YORK

ENERGY AND COMMERCE
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OPENING STATEMENT

REP. ED TOWNS

HEARING ON SUPERFUND LIABILITY

8 November 1993

Mr. Chairman. I commend you for holding this hearing and for bringing us such a diverse group of witnesses. Their presence indicates how broad a spectrum of society feels the impact of the superfund program, and I would assert that even more are effected by it but do not know it.

Superfund represents one of the bedrock efforts at cleaning up our environment, and especially at protecting the public from the health risk posed by hazardous waste sites. Its liability scheme was designed to ensure that the polluter and not the taxpayer would pay for clean up. However, those two goals, protecting the public health and getting the polluter to pay, have often been put at odds in the implementation of superfund. We have seen protracted litigation over liability, while the overwhelming majority of sites on the National Priority List remain there, as yet uncleaned and as great a danger to our communities as ever. Meanwhile, actors both large and small face uncertain demands under the liability scheme. Thus communities can face a double burden of companies going bankrupt -- with attendant job loss -- while the health risks of waste sites remain.

It is my hope that we will be able to address both these issues in superfund in the future. Where there is a health threat, we need quick and effective clean up. Where there is liability, we need quick resolution to assess appropriate shares and to separate the bad actors (and the insolvent) from the good. I certainly hope that through quick and efficient procedures we can cut down on transaction costs.

I have heard some intriguing proposals, including several from our witnesses today. I want to recognize the Rev. Dr. Ben Chavis, Executive Director of the National Association for the Advancement of Colored People. I am delighted that -- in keeping with his years of ground-breaking work on environmental justice -- he, too, has offered up a promising proposal for improving the superfund program. I am further encouraged that many of the proposals share some common ground, and see that as a positive sign -- and an incentive -- for Congressional action.

Again, I commend Chairman Synar for holding this hearing today, and I look forward to the testimony from our witnesses.

Eight-Point Plan for Action

proposed by

Dr. Benjamin F. Chavis, Jr.
Executive Director and Chief Executive Officer
National Association for the Advancement of Colored People

John W. Johnstone
Chairman, President and Chief Executive Officer
Olin Corporation

Joseph W. Brown
Chairman, President and Chief Executive Officer
Talegen Holdings (formerly Crum & Forster Insurance Companies)

October 1993

printed on recycled paper

Superfund Reform:

EIGHT-POINT PLAN FOR ACTION

October 1993

The many groups now debating Superfund reform have specific goals for the reauthorization process. Listening to the public debate, it sounds as if many of these goals are in conflict. On closer look, however, there is a striking similarity between the core goals of Superfund stakeholders.

This mutuality of interests suggests that it is possible to produce a Superfund reform plan that truly accomplishes the overarching goals of protecting human health and the environment, without ignoring the concerns of key players.

Superfund is not working for any of the major stakeholders, but by starting off recognizing that the major stakeholders share mutual objectives -- and adding a large dose of goodwill, compromise and a strong focus on practical solutions -- that can change. Equally critical, any compromise will require a willingness to acknowledge that no group can achieve all its priorities, but all can achieve their top priorities.

A review of these priorities reveals that people of color, local citizens, environmentalists, small business, local governments, big business and insurers all want much the same from Superfund: a focus on public health, speedier cleanups, more public participation, maintenance of a "polluter pays" standard, lower transaction costs, better remedy selection, and more fairness.

The eight-point plan which follows addresses all of these issues, as well as other issues of particular importance to various stakeholders. It is the only Superfund reform plan which truly tries to address the legitimate interests of all stakeholders equally, rather than elevating one set of interests over others.

Few, if any, dispute that for the last 13 years cleanup at Superfund sites has been abysmally slow. Most also agree that legal battles over cost allocation and remedy selection not only have stalled cleanup, but also have engendered enormous costs and diverted the program's focus from public health and environmental protection to fund-raising.

Superfund has always been an emotional and controversial program. But there is an opportunity now for it to emerge as one of the crown jewels in the reinventing government crown. The eight-point plan offers a way to reinvent Superfund so the battles end and the program is redirected toward the people and places the law was intended to serve.

1. THE RIGHT PURPOSE: Public Health.

Superfund's primary goal is to protect human health and the environment, yet that clearly is not the program's focus. After 13 years, hazardous waste cleanup in America remains a problem of immense proportion, with more than 1200 sites on the NPL and only 150 completed cleanups (not to speak of many sites not on the NPL). That means that the health of people living near, or in some cases on, contaminated ground may be in serious jeopardy, because we know very little about the long-term health effects of exposure to toxic waste.

By changing Superfund's focus from battles over who will pay to a new focus on public health, however, Superfund could be an effective ally in our nation's on-going effort to prevent disease and contain health care costs. We propose a Superfund program run on public health grounds by public health officials -- not run on fundraising grounds by lawyers. This public health process would begin at the time a site is first proposed for the NPL and would not end until the site is delisted. Initial site screening, public health testing, emergency removal and a new hazard ranking and spending priority system would assure a public health focus.

2. THE RIGHT SIZE: Adequate Funding.

A lack of adequate funding has stalled site cleanup and related priorities since Superfund's inception. Current Superfund spending related to NPL sites is about $2.8-3.0 billion a year, with the most generous estimates of cleanup spending at about $2.3-2.5 billion. That figure includes single-party sites, oversight of DOE and DOD site cleanup, and significant internal transaction costs, as well as other wastage produced by the program's fundraising focus. The financing of the program focussed on multi-party sites should be expanded by 50-100 percent over current cleanup spending on such sites, resulting in an overall program of $3.5-4.5 billion per year.

This financing expansion would be provided by a broad-based business tax and other special contributions and assessments, replacing the current site-by-site financing efforts. This would substantially raise the level of funding available for site remediation and make the funds readily available. Legal battles over funding issues at multi-party sites would no longer slow, drain and divert the program. With adequate funding, a comprehensive Superfund remediation program that focusses on safeguarding the health and viability of affected communities can emerge. In addition to cleanup, funds would be available for concerns that have received little attention to date such as public participation, public health, training and natural resources restoration. (Site-by-site financing would continue to apply to single-party sites, parties which disposed of waste after a fixed, past cutoff date, and parties which violated the law at the time of disposal.)

3. THE RIGHT PLACES: Environmental Impact Prioritization.

Site prioritization needs to be reformed. Cleanup decisions and progress depend much more on whether a site has cleanup funds (i.e., successful negotiations or litigation with solvent PRPs), than on whether serious public health risks exist. A new hazard ranking system that takes into consideration not only the risks presented by the toxic waste site in question, but also the health effects it may have in conjunction with other environmental risks in the area (such as other dump sites, industrial facilities and abandoned plants) should be required. And then all subsequent cleanup decisions and actions should be based on the same priorities. Such a system would move those sites that most threaten the affected population to the top of the priority list.

4. THE RIGHT WAY: Effective Remedies.

Remedy selection is a contentious issue, because the present program breeds so much mistrust among the various parties (citizens, PRPs and government). As a result, there is no real agreement on remedy selection priorities, and more costly options often are chosen over more efficient ones. Much of the time, this happens because EPA knows it is spending PRP money, not its own. PRPs believe EPA and others see cleanup as a "free good," and that this results in pressure for unnecessarily expensive remedies. The concerns of citizens and environmentalists are the opposite: they fear inappropriately weak remedies are selected to save money. These unnecessary confrontations take cleanup down the wrong road. A new package of remedy selection reforms is needed. In all cases, protection of public health must be the standard, but factors such as land use and available technology must be taken into account. In addition, the affected public should be involved at every step in the decision-making process.

5. THE RIGHT FINANCING SYSTEM: Business Taxes and Assessments on those Parties which Benefit.

The most efficient way to raise a larger fund is to assess larger taxes on business, rather than pursuing the site-by-site fundraising system which has so bogged down the program. Large and small business should support this because they will benefit from the removal of the present fundraising system for old, multi-party sites. Public entities should contribute as well because such a system will remove significant PRP liability for them at these multi-party sites.

The expanded fund would pay to cleanup hazardous waste disposed of before a particular cutoff date in the past, and to restore natural resources. Entities which legally disposed of waste before that date would no longer pay for cleanup on a site-by-site basis, but instead contribute through the expanded tax and contribution system. Entities which illegally disposed of waste will remain liable for cleanup costs regardless of when the disposal occurred; the cutoff date will not apply to them, nor will it apply to parties which disposed of waste after the date.

That date -- which should fall somewhere between 1980 and the present -- should be decided based on several criteria: (1) impact on speed and efficiency of cleanup (i.e. after what date does the practicality, costs and benefits of pursuing the current system make sense); (2) the number of current NPL sites are affected by each possible cut off date (3) the practical availability of records at most sites to reasonably and quickly allocate liability; (4) the date following implementation of RCRA and other disposal permitting requirements which made the rules of behavior clear for most PRPs such that they should pay for cleanup even if they did not violate the law of the time; and (5) the date which most effectively reduces transaction costs and other expenses related to litigation.

6. THE RIGHT PEOPLE: Public Participation and Empowerment.

Community leaders need to be brought into the Superfund process, at the beginning and throughout the process. Too often, legal feuding between EPA and PRPs over remedy and cost decisions keeps citizens at arm's length. This is because EPA and PRPs communicate through their attorneys, who view involvement by additional parties and the free sharing of information as a threat to their negotiating positions. Under our proposal, as the program's focus shifts from financing concerns to concerns of public health, citizens would be involved from the initial stages of the process. Representative community groups would be formed for each site, given access to all validated data collected by EPA and tasked with participating in the process from inception to completion. In addition, both these groups and affected citizens' representatives on the groups would be given the resources to participate fully.

The Superfund program also would provide opportunities for minority job training and the involvement of minority businesses in environmental cleanup contracts.

7. THE RIGHT SAFEGUARD: Prospective Liability.

Prospective Superfund liability -- along with other environmental laws, waste disposal regulations and market forces -- are strong incentives for proper waste management today. These incentives would not change and in some cases may be enhanced by this plan.

8. THE RIGHT APPROACH: Coordination of Other Programs.

A disproportionate number of sites are located near poor and minority communities, whose infrastructures are disintegrating. Businesses have fled the area, taking jobs and tax dollars with them. The schools may have taken a sharp downturn, and health problems may have begun to surface. Superfund's failure to clean up old toxic waste sites has magnified the problems of these communities. To help reverse this trend, rapid, effective cleanup is the first step, as discussed above. In addition, however, more than cleanup needs to be done. The resources of other federal programs need to be focussed on areas of high negative environmental impact so that these communities can recover. Examples of such services include those provided by the U.S. departments of Health and Human Services, Housing and Urban Development, Commerce, Education, and Labor. ■

Attachment C

Financing Option

The following describes one acceptable approach to financing the Superfund program.

Non-site Specific Funding

Oil Tax	$550 million (current policy)
Chemical Taxes	$250 million (current policy)
Broad business taxes	$1350 million (e.g. 2x EIT for large businesses; $100 million for small businesses[1])
Insurer tax	$300 million
State share (10%)	$300 million
Federal Government	$300 million

Site Specific Funding

PRP payments at single party sites	$500 million
PRP payments for post-1986 disposal and illegal disposal	$80 million
PRP recoveries for non-NPL emergency removal	$40 million
Total	$3.670 billion

[1] The small business tax would be levied on facilities officially classified by EPA as small quantity generators (SQGs). According to EPA, as of December 15, 1993 there were 187,645 SQGs in America: an average tax of $533 per SQG would raise $100 million. Smaller firms would pay much less than that per SQG facility. Larger firms would pay more. An alternative would be to apply such a tax to SQGs and large quantity generators owned by companies which do not pay the EIT.

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